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No. 726

IN THE

Supreme Court of Pennsylvania

EASTERN DISTRICT.

January Term, 1957. No. 193.

In the Matter of SELF DRIVE IT CORP.

M. ALEXANDER FORMAN AND BETTY FORMAN,
Appellants.

RECORD

APPEAL FROM THE ORDER AND JUDGMENT OF THE COURT OF COMMON PLEAS NO. 1, OF THE COUNTY OF PHILADELPHIA, AS OF SEPTEMBER TERM, 1956, NO. 4495.

J. WEBSTER JONES,
500 Land Title Bldg.,
Philadelphia 10, Pa.,
Attorney for Appellants.

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

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Record

RELEVANT DOCKET ENTRIES.

10-24-56. Order made appointing Irwin Apfel, Esq. and David Cohen, Esq., temporary Receivers. Bond to be filed in the amount of $50,000.00; see order, Kun, P. J. filed.

10-25-56. Bond filed. Aetna Insurance Co. Surety, Approved by Court.

10-30-56. Petition of Receivers for appointment of counsel, filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

10-30-56. Petition of Receivers for authority to continue payment plan of financing and leasing arrangements, filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

10-30-56. Petition of Receivers for leave to employ officer of Self Drive It Corp. filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

11-15-56. Report and Inventory and Appraisement of Temporary Receiver filed.

11-15-56. Exhibits to Report and Inventory and Appraisement of Temporary Receiver filed.

11-15-56. Order made and directed that a hearing be held on Nov. 21, 1956. 3 P. M. Room B 243 to determine whether a liquidating receiver should be appointed. Five days notice of said hearing be given to all shareholders of Self Drive Corp. See order Kun, P. J. filed.

11-15-56. Petition of Receiver for turn over filed.

Relevant Docket Entries

11-15-56. Order and decreed that M. Alexander Forman and Betty Forman are hereby restrained and enjoined from selling, transferring, or otherwise disposing any or all of the 100 shares of Common Capital Stock Self Drive Corp. etc., pending the determination of this petition and rule. Rule returnable Dec. 10, 1956 3 P. M. Room B 243. See order Kun, P. J. filed.

11-21-56. Exceptions of M. Alexander Forman and his wife Betty Forman to the report and inventory and appraisement of the Temporary Receivers filed.

11-28-56. Order made appointing Irwin Appel, Esq., liquidating receiver, the existing amount of security posted shall continue, see order Kun, P. J.

12-4-56. Sten. notes filed.

12-4-56. Petition of Liquidating Receiver for appointment of counsel filed.

Eo die. Petition granted and order made appointing Miller, Adelman and Lavine, Esqs., general counsel for Irwin Appel, Liquidating Receiver, see order filed.

12-4-56. Petition of Liquidating Receiver to sell assets in bulk at private sale filed.

12-5-56. Petition granted, see orders. Returnable Dec. 19, 1956 at 3 P. M. Room B 243 Kun, P. J. filed.

12-7-56. Answer to petition for turn over order filed.

Relevant Docket Entries

Eo die. Motion under Rule 25 (a) to quash, set aside and dismiss the above proceedings.

Eo die. Order for special appearance of J. Webster Jones, Esq., for M. Alexander Forman and Betty Forman filed.

Eo die. Exceptions to all orders and decree heretofore filed.

12-14-56. Motion to strike "Order for special appearance" filed.

12-18-56. Exceptions of M. A. Forman, et al., see order etc. dismissed. Opinion to be filed.

Eo die. Motion of M. A. Forman, et al. to quash etc. dismissed. Opinion to be filed.

12-19-56. Petition of M. A. Forman and Betty Forman his wife for a rule upon Richard S. Forman and Florence Forman to show cause why they should not accept an offer to pay them the sum of one-half of the net assets of the Self Drive It Corp. held by them filed.

Eo die. Rule refused, Kun, P. J.

12-19-56. Opinion, sur motion to quash proceedings and sur exceptions to order and decree, Kun, P. J. Concur Hagan, J., filed.

12-19-56. Certiorari from Supreme Court as of Jan. 1957 No. 193 brought into office and filed. Alexander Forman, Betty Forman Appellant.

12-28-56. Sten. notes filed.

1-3-57. Petition of Liquidating Receiver for authority to collateralize past due payments on security loan to Tradesmens Bank & Trust Co. filed.

Eo die. Petition granted see order Kun, P. J. filed.
1-3-57. Sten. notes filed.
1-8-57. Liquidating Receivers report and petition for confirmation of private sale in bulk of real estate and personality filed.
Eo die. Petition granted see order Kun, P. J. filed.
1-11-57. Affidavit under Supreme Court Rule 43 filed.
Eo die. Supplementary order confirming sale Kun, P. J. filed.
Eo die. Petition of Liquidating Receiver for authority is discharged security liens of First Nat'l Bank of Boston and Tradesmens Bank & Trust Co. filed.
Eo die. Petition granted see order Kun, P. J. filed.
1-14-57. Affd't assignment of bond filed.
Eo die. Sten. notes filed. If exception is deemed necessary to have an exception to the court's action, the exception is now entered for them.
1-15-57. Exception of M. Alexander Forman and Betty Forman to order of sale and confirmation of sale on Jan. 8, 1957, filed.
1-21-57. Receiver bond filed.
1-21-57. Petition for discontinuance proceedings and orders thereon, and application authorizing Liquidating Receiver to repay additional stock subscription monies filed.
1-30-57. Exceptions dismissed.
Eo die. Memorandum, Kun, P. J. and Hagan filed.

Order of Court

1-31-57. Order fixing hearing for Feb. 6, 1957 at 3:30 P. M. Room 248 and further ordered that 5 days notice of said hearing be given to all shareholders of Self Drive It Corp. See order, Kun, P. J. filed.

1-31-57. Petition of Liquidating Receiver to pay remaining obligation insured by temporary receiver and liquidating receiver during the operation of Self Drive It Corp. covering the period Oct. 25, 1956 to Jan. 8, 1957 filed.

Eo die. Petition granted, see order, Kun, P. J. filed.

2-6-57. Petition to discontinue and terminate turn over proceedings and applications authorizing Liquidating Receiver to repay additional stock subscription granted. See order Kun, P. J.

2-25-57. Appeal taken to Supreme Court of Penna. on 12-19-56, No. 193, Jan. Term 1957 by M. Alexander Forman and Betty Forman.

ORDER OF COURT.

AND NOW, to wit, this 24th day of October, 1956, upon consideration of the within Petition, it is ORDERED and DECREED:

1. That Irvin Apfel and David Cohen are hereby appointed temporary Receivers of all the assets, property, franchises, rights, privileges, of whatso-

ever kind of Self Drive It Corp. within the jurisdiction of this Court, with power to take, hold, demand, receive and collect all funds and assets belonging to said corporation.

Said Receivers are hereby empowered to operate the business of Self Drive It Corp. in such manner as may, in his judgment, be necessary and required for the preservation and protection of the assets of said corporation, and in so operating shall perform all the necessary and required actions in connection with the normal and general conduct of the business activities of Self Drive It Corp.

The said Receivers are hereby authorized to borrow such monies not in excess of seventy-five thousand ($75,000) dollars, subject to further order of this Court, as may be necessary and incidental in the conducting and operation of the affairs and business of Self Drive It Corp.

The said Receivers shall file an inventory and appraisement of the assets and property forthwith and shall, within thirty (30) days from the date of his appointment, make a full report to this Court.

The Receivers, in the conduct and operation of the business, shall employ such persons and make such payments and disbursements as may be necessary and incidental for said operation.

The Receivers are hereby given authority to operate the business of Self Drive It Corp. for a period of sixty (60) days, subject to further order of this Court.

That the Court shall, pursuant to order, fix a date

for hearing upon this Petition, and, at such time, upon the petition and facts and full hearing held thereon, make its determination upon the appointment of a permanent receiver for such purposes as the Court may thereupon determine.

The Court hereby fixes bond to be filed by the Receiver in the amount of Fifty thousand dollars ($50,000).

IT IS FURTHER ORDERED AND DECREED:

2. That Self Drive It Corp., its officers, directors and shareholders, agents and employees, shall forthwith turn over and deliver unto the Receiver, or his duly constituted agent or representative, all of the real and personal property of Self Drive It Corp., its assets and effects, as also all books of account, vouchers, deeds, leases, contracts, notes, accounts, monies, or other property belonging to Self Drive It Corp.

* * * * * * * * *

BY THE COURT,

KUN.
P. J.

Petition of Shareholder for Appointment of a Receiver

PETITION OF SHAREHOLDER FOR APPOINTMENT OF A RECEIVER.

The Petition of RICHARD S. ROBINSON, respectfully represents:

1. That he is a shareholder of Self Drive It Corp., a Pennsylvania corporation.

2. That the petitioner, together with his wife, Florence H. Robinson, are the registered holders and owners of one hundred (100) shares of the common capital stock of Self Drive It Corp., representing fifty (50%) per cent of the total authorized and issued capital stock of said corporation; that the remaining fifty (50%) percent of the common capital stock of Self Drive It Corp. is held and owned by M. Alexander Forman and his wife, Betty Forman.

3. That the Directors of the corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock; and that irreparable damage and injury is being suffered by the corporation, and such damage and injury will continue and be of such character and nature as to destroy the equity of the shareholders and may be injurious to the creditors.

4. That the actions of the officers, directors and shareholders in the instant matter are such as to pre-

vent the corporation from properly functioning, and are preventing the carrying out of normal operations by the corporation in that certain officers and management in control have refused and continue to refuse to carry out their respective duties, more particularly the signing of checks with which to pay employees, the payment of obligations to creditors generally, and the meeting of financing obligations due currently, all of which actions are of such character and nature as to threaten the corporation with financial collapse.

5. That there is immediate danger of misapplication of corporate funds.

6. That there have been acts of misapplication and the threat of continued such actions may be both embarrassing and destructive to the corporate affairs.

7. That in order to preserve the assets of the corporation for the benefit of all parties in interest, it is urgent and necessary that this Court immediately appoint a Receiver to take charge of the affairs of the corporation, to manage and operate same, and to properly and pursuant to the respective Court orders wind up and liquidate the assets of the corporation to the best interests of all parties.

WHEREFORE, your Petitioner prays your Honorable Court to grant the following relief:

Petition of Shareholder for Appointment of a Receiver

(a) That a Receiver be appointed for the corporation to take possession of all of its assets, books and records and to conduct the business and affairs of the corporation subject to further order by the Court.

(b) That the Receiver, if so ordered and directed and subject to full report of the Receiver, be authorized to liquidate the assets and wind up the business of the corporation in the nature of dissolution.

(c) That this Honorable Court grant such other and further relief as it may deem necessary.

RICHARD S. ROBINSON,
Petitioner.
ROBINSON, GREENBERG and LIPMAN,
MILLER, ADELMAN and LAVINE.

Jurat.

REPORT AND INVENTORY AND APPRAISEMENT OF TEMPORARY RECEIVERS

(11a)

OCTOBER 25,

A S S E T S

CURRENT:

Cash in Tradesmens Bank and Trust Co.		$ 8,479.46
Cash in Franklin National Bank		98.35
Cash on Hand		925.00
Accounts Receivable - Customers	40,061.54	
Less Reserve for Estimated Bad Debts	19,433.92	
		20,627.62
Accounts Receivable - Employees, etc.		299.48
Due from Forman and Robinson (an affiliated partnership) (current)		842.20

Automobile Rental Equipment:

	Number of Units	Cost	Reserve for Depreciation	Carrying Value
Assigned (Contra)	387	811,205.60	281,771.63	529,433.97
Free (Unassigned)	11	24,536.14	13,194.16	11,341.98
	398	835,741.74	294,965.79	
Carrying Value				540,775.95

Prepaid Expenses: Taxes, Insurance, License Tags and Deposits	7,491.79

Due from Forman and Robinson (an affiliated partnership) (current) 842.20

Automobile Rental Equipment:

	Number of Units	Cost	Reserve for Depreciation	Carrying Value
Assigned (Contra)	387	811,205.60	281,771.63	529,433.97
Free (Unassigned)	11	24,536.14	13,194.16	11,341.98
	398	835,741.74	294,965.79	
Carrying Value				540,775.95

Prepaid Expenses: Taxes, Insurance, License Tags and Deposits 7,491.79

TOTAL CURRENT ASSETS	579,539.85
INVESTMENTS: (At Cost) Listed Securities (assign to Tradesmens Bank and Trust Co.) (Contra)	592.61

FIXED:

	Cost	Reserve for Depreciation	Carrying Value
Land and Building	$ 90,955.16	$ 7,129.49	$83,825.67
Building Improvements	28,022.74	5,261.08	22,761.66
Furniture and Fixtures	6,071.95	1,159.33	4,912.62
Signs	6,119.50	69.13	4,450.37
Motorcycle	500.00	347.22	152.78
	$131,669.35	$15,566.25	

TOTAL FIXED ASSETS	116,103.10
TOTAL ASSETS	$696,235.56

(11a)

L I A B I L I T I E S

(12a)

CURRENT:

Notes Payable - Tradesmens Bank and Trust Co. (Secured by assignment of 338 units) (Contra)	$376,981.80	
Notes Payable - First National Bank of Boston (Secured by assignment of 49 units)(Contra)	70,382.32	
Notes Payable - Girard Trust Corn Exchange Bank (Secured by assignment of Boiler Costing $2,275.00)	200.95	
Accounts Payable (Dealers, etc.	56,152.22	
Loan Payable - Penn Auto Leasing Company	4,000.00	
Accrued Taxes - Payroll, Sales, etc.	11,308.72	
Reserve for State and Federal Income Taxes (1954-1955)	4,067.59	
Accrued Officers' Salaries	18,200.00	
TOTAL CURRENT LIABILITIES		541,293.60

MORTGAGES PAYABLE:

David H. Cohen	4,072.53	
Fidelity Mutual Life Insurance Company	16,985.50	
TOTAL MORTGAGES PAYABLE		21,058.03

Estimated State and Federal Income Taxes Payable (1955-1956)		15,742.93
TOTAL LIABILITIES		578,094.56

CAPITAL:

Capital Stock:

Authorized (200 shares-Par Value $100.00)	20,000.00	
Less Unissued (180 shares)	18,000.00	
Outstanding Capital Stock (20 shares)		2,000.00

Estimated State and Federal Income Taxes Payable (1955-1956)		15,742.93
TOTAL LIABILITIES		578,094.56

CAPITAL:

Capital Stock:

Authorized (200 shares-Par Value $100.00)	20,000.00	
Less Unissued (180 shares)	18,000.00	
Outstanding Capital Stock (20 shares)		2,000.00

Surplus (Page 3)	116,141.00	
TOTAL CAPITAL		118,141.00
TOTAL LIABILITIES AND CAPITAL		$696,235.56

Balance of Surplus, December 1, 1955	$ 92,397.66
Add: Net Profit for the Period December 1, 1955 to October 25, 1956 (Page 4) (After Estimated Income Taxes)	23,743.34
Balance of Surplus, October 25, 1956	$116,141.00

(12a)

Hearing
Richard S. Robinson—Direct

HEARING.

Philadelphia, Pa., November 21, 1956.

Before: HON. JOSEPH L. KUN, P. J.

HEARING ON PETITION FOR APPOINTMENT OF LIQUIDATING RECEIVER.

RICHARD S. ROBINSON, sworn.

BY MR. MILLER:

Q. Mr. Robinson, you are the Richard Robinson who signed the petition as shareholder for the appointment of a receiver in these original proceedings?

A. Yes, sir.

Q. What is your association with the Self-Drive It Corporation?

* * * (N. T. p. 2.)

THE WITNESS: I am the president of the corporation.

Q. It is a fact that you hold 49 per cent of the capital common stock of Self-Drive It Corp. and that your wife owns 1 per cent?

A. Yes, sir.

Q. So that between you and your wife you are 50 per cent stockholders?

A. Yes, sir.

Q. And M. Alexander Forman and Betty, his wife, are likewise 50 per cent stockholders?

A. Yes, sir.

Q. M. Alexander Forman holding 49 per cent and his wife, Betty, holding 1 per cent; is that correct?

A. Yes.

Q. Will you tell us what your duties are in connection with the operation of Self-Drive It Corporation?

MR. JONES: I am going to interpose an objection because the by-laws of the corporation state that and they are the best and only evidence and should be here.

THE COURT: He may state them. Why be so technical about these things?

* * * (N. T. p. 3.)

A. I handle the buying of the new cars and the

financing of the same and the selling of the used cars, the supervision of our salesmen on contracts, helping to set up the policies on our rates, daily or yearly, and duties similar to that.

Q. Including the handling of personnel, the hiring and discharging of employees?

A. I did usually.

Q. It is a fact, is it not, that you and your wife and Mr. Forman and his wife are the full directors of this corporation?

A. That is right, sir.

Q. Will you name the officers of the corporation?

A. Name the officers?

Q. Yes.

A. I am president and Mr. Forman is vice president and treasurer, or secretary-treasurer.

BY THE COURT:

Q. You and your wife and the other gentleman and his wife own equal interests?

A. Yes.

Q. Among you, you own the corporation?

A. Yes.

Q. Each of you with his wife owns 50 per cent?

A. Yes.

Q. So that neither one of you has control, in a sense?

A. That is right.

BY MR. MILLER:

Q. Mr. Robinson, in the original petition filed in this cause you allege that the directors of the corporation were deadlocked in the management of the corporate affairs?

A. Yes.

Q. And that the shareholders and management were unable to break this deadlock?

A. That is right. As a result, it looked like the corporation would suffer irreparable damage and injury.

Q. Will you explain to me how that came about?

BY THE COURT:

Q. Just explain to me how that deadlock arose and how this whole dispute arose.

A. Your Honor, we had a dispute in policy going back about a few months about whether or not we could reduce our fleet of cars. At that time it was my opinion and still is that if we reduced our cars and cut back on our financing program, the business could not exist successfully or even unsuccessfully; it might die by its own strangulation. Mr. Forman thought differently. That was the beginning of the problem. Then various other things happened. We got to a point where on a certain date Mr. Forman would not sign pay roll checks and our employees in the corporation went home without their pays. Although we had had a difference of opinion, it was

kept as secret as possible up to the moment when Mr. Forman refused to sign the pay roll checks, and then of course it was necessary that the employees know something, so I had to go to the help and tell them that since they were not getting their pay, I could not guarantee them work after this week because of the inability to pay them. That kind of demoralized them and brought the matter out in the open in the shop, and they didn't know who to take orders from. Finally on November 19th—I may be mistaken about the date; it was on Monday ——

BY THE COURT:

Q. That is just an approximate date?

A. Yes. Moneys were taken out of the cash box by Mr. Forman—they were not stolen; I am not alleging that, but they were taken out,—which confused our bookkeeping department, and eventually the men were paid from the moneys that he took out of the drawers.

On Tuesday we had a $29,000 and some odd dollars note to meet at the bank. We had the money in the bank and Mr. Forman at that time refused to sign the check. I went to him and explained that if he didn't sign the check, if we didn't get the check down to the Tradesmen's, we would be in default, which would be the worst possible thing that could happen to us, in my opinion, and he still refused to sign the check.

Q. Was that the incident that led to the filing of this petition?

A. Yes.

BY MR. MILLER:

Q. Were funds available to meet that check?

A. Yes, they were, Mr. Miller.

THE COURT: Well, that is a simple enough story.

BY MR. MILLER:

Q. Was there any serious conflict between you and your associate, Mr. Forman, with respect to financing arrangements that were conducted by the business?

THE COURT: You need not go any further, Mr. Miller. This, on the face of it, shows a conflict that requires the Court to act. That is all there is to it. It is as simple as it can be. You need not go further with your examination, but perhaps Mr. Jones wants to ask him some questions.

MR. JONES: Yes; I will be very glad to.

CROSS-EXAMINATION.

BY MR. JONES:

Q. Mr. Robinson, when was the last directors' meeting held?

A. The directors of Self-Drive It?

Q. Yes.

A. Frankly, I don't remember.

Q. To help you, I suggest to you that no directors' meeting was held or minutes posted since 1952. Is that so?

A. I really wouldn't know.

THE COURT: That does not bear on the question before the Court; not at all.

MR. JONES: Well, sir, if he were doing this as president, he certainly did it under some authority from the Board.

THE COURT: I don't care about that. It is a question of a status that has been created. I don't care whose fault it is. It is not a question of whose fault it is. It is a question of what the actual situation is, don't you see?

BY MR. JONES:

Q. Mr. Robinson, you told the Court that the check for $29,000 was not signed and delivered to

the bank on the day that you signed it. Do you want to modify that in any way?

A. Yes, I can modify it, Mr. Jones.

Q. Why don't you tell the Court what happened, Mr. Robinson?

A. All right, I will be very happy to do that. Your Honor, at the time that Mr. Forman would not sign the check—it was presented to him twice, once in our office on Monday evening by one of my employees,, and also on Tuesday in Mr. Jones' office. He refused each time. At the time my head bookkeeper called me in my office on 23rd Street and told me Mr. Forman wouldn't sign the check, I immediately called the Tradesmen's and asked Mr. Weber, the assistant vice president in charge of our account, and I informed him of the impasse that we had in our management, and I told nim that I could only give him a check to pay this note with one signature and would he accept that, since the deposit in our account at this bank was sufficient. I asked him would he so charge our account and he said he would. Then I made up a letter to Mr. Weber explaining the circumstances and explaining why I was sending down a check with only one signature. That was the only thing, so far as I was concerned, and I didn't get into it again untill a few days later. I found out then that Mr. Forman, when the bookkeeper was taking the check to the bank, saw the letter and check and signed the check, after I had called the bank and informed them of the controversy or the impasse that we were having in this corporation.

Q. Mr. Forman was the treasurer of the company, wasn't he?

A. That is true.

Q. And the moneys that you say he took were used to pay the men whose salaries were due?

A. Were taken for that reason?

Q. Yes.

A. I don't know.

Q. Well, they were paid from that money, were they not?

A. That is right.

Q. On the date on which you say Mr. Forman refused to sign the checks, is it not a fact that you presented to Mr. Forman a series of checks which did not include certain payments of salaries to him, yourself and others that were ordinarily made, and you demanded that he sign only a certain number of checks, and that no checks be signed for his salary during that week? Is that correct?

A. That is incorrect, sir.

Q. Did you agree to sign a check covering his salary and your salary that week?

A. Yes, I did.

Q. And did you sign it?

A. Yes, I did.

THE COURT: I don't see that that has anything to do with the controversy. It was his duty to sign the checks for the pay roll. The fact that they had a dispute among themselves did not justify him in refusing to sign the checks to pay the help. That was

quite irregular. The fact that they might have had problems between themselves as to whether one or the other is entitled to salary does not affect his primary duty to pay the help and keep the business going. They are two unrelated things.

* * * (N. T. p. 11.)

MR. JONES: I intend to contradict what has been said.

THE COURT: Mr. Jones, I will grant your request for a continuance for a week, but don't you see, it does not affect the situation at all. From what I have heard here, there must be a receivership. It is implicit in the whole situation. I don't care how many disputes there are. The more disputes there are, the more reason there is for the receivership. Go ahead with the examination now.

THE WITNESS: Mr. Jones, ——

* * * (N. T. p. 12.)

Q. Yes. Go ahead then.

A. Mr. Jones, you spoke to me about the salary of Mr. Forman and myself. I signed that check, Mr. Jones.

Q. On the day when you say he refused to sign it for the other parties?

A. That is right. Our salaries were included in that check.

* * * (N. T. pp. 13 and 14.)

Q. Mr. Robinson, isn't it correct that the only situation that exists at this time is that your corporation is not in a position to borrow more money? Is that correct?

A. That is not correct.

Q. Is it in a position to borrow more money?

A. No. You said is that the only thing that is wrong.

Q. All right. Your corporation needs additional funds to purchase cars for expansion; is that correct?

A. That is right. Pardon me. We don't need them for expansion. We need additional funds to continue the same operation we have today. This has only been partially successful. We don't have financing today to complete the cars that we have. We have a note due this Friday that we cannot meet for that reason.

* * * (N. T. pp. 15 and 16.)

RE-DIRECT EXAMINATION.

BY MR. MILLER:

Q. Mr. Robinson, will you state for the record whether or not the differences that have arisen and continued to exist between yourself and Mr. Forman are irreconcilable?

MR. JONES: I object to the question. It presupposes that there are differences.

THE COURT: I have heard testimony as to differences. It is a proper question. I have heard what he has testified to. He may answer it.

THE WITNESS: Mr. Miller, I would say, after a good many years of association with that company, that we should never be together again one minute more than is necessary.

MARIE ARRINGTON, sworn.

BY MR. MILLER:

Q. Miss Arrington, you are an employee of Self-Drive It Corporation?

A. Yes, I am.

Q. What services do you render to the corporation?

A. Bookkeeper.

Q. Are you familiar with the pay roll that was prepared on November 19th, that was referred to by Mr. Robinson?

A. October 19th, you mean?

Q. Yes, October 19th. Excuse me.

A. No, sir. I wasn't there that day.

Q. Do you know what that pay roll contained, you being the bookkeeper?

A. Yes, I do.

Q. You heard Mr. Robinson testify that that check

included the salaries to be paid out to himself and to Mr. M. Alexander Forman?

A. Both were included in the Self-Drive It Company pay roll, yes.

MR. JONES: Sir, I am objecting to this. The pay roll itself and the check should be before the Court.

THE COURT: Are they available? Apparently not.

* * * (N. T. pp. 17 and 18.)

Q. Well, you can produce it at the next hearing, because at the request of the attorney for the Exceptants, there will be another hearing.

BY MR. MILLER:

Q. Miss Arrington, you heard Mr. Robinson testify, with respect to the check that was issued the following month, I believe the 21st of November, to the Tradesmen's National Bank, it went to cover a monthly installment then due?

A. Yes.

Q. Did you handle the transaction, so far as obtaining signatures to that check?

A. Yes, I did.

* * * (N. T. pp. 18 and 19.)

Q. What, if anything, do you know about the signatures required on that check and the presentation of it by you at all to obtain those signatures?

A. I made out the check to the bank, which Mr. Robinson signed. Mr. Forman was not in at the time and I left word when I left the office for Mr. Forman to sign the check that was due at the bank at that time. So far as I know, that is when he stopped in that day, because I ran the check over with one of the employees. The next morning when I came in I was given the check back and told that Mr. Forman did not sign it.

Q. Well, do not tell us what you were told. You say the check was not signed?

A. Well, I was told it was not signed and then I was given the check back.

Q. Well, then you saw that it was not signed by Mr. Forman?

A. That is right. Do you want me to go on about the check?

Q. Well, that is all he has asked you, I think. Did you, yourself, have any talk with Mr. Forman about it?

A. Later that morning.

* * * (N. T. p. 20.)

Q. You may testify to that.

A. All right. When I got in in the morning I had a call from Mr. Forman to meet him at Mr. Jones' office with the pay roll envelopes, which I took with

me, and Mr. Robinson heard me talking to Mr. Forman on the phone and asked me if I would ask Mr. Forman again to sign the check, which I did. Mr. Forman looked at it and he said he was waiting for Mr. Jones to come in, but he didn't think he would sign it, and Mr. Robinson asked me, when I was leaving, if Mr. Forman did not sign it, to call him and let him know. Mr. Jones came in and Mr. Forman showed him the check and told him he wasn't going to sign it and he gave it back to me and I called Mr. Robinson and told him that he did not sign it, and at Mr. Jones' office I made up the payroll envelopes with the money that Mr. Forman had taken from the cash boxes and I took them back to the office with the check for the bank, and I gave everybody their pay, and Mr. Robinson gave me a letter to send to the bank with the check that he was sending to the bank. The check only had one signature on it since Mr. Forman wouldn't sign the check. However, Mr. Robinson had a conversation with the bank for them to take it out of the account. Mr. Forman came in later in the day. He saw the letter, he read it, and he apologized for causing extra work. He said he would sign the check, which he did sign, and I took it to the bank that afternoon.

CROSS-EXAMINATION.

BY MR. JONES:

Q. Was I in the office when you got there?
A. No, sir. You were not

Q. Do you know whether or not I knew that you and Mr. Forman were coming?

A. That I don't know.

Q. I see. The pay roll that you speak of was the pay roll for the preceding Friday, which had not been signed? Is that correct?

A. That is correct.

Q. And you obtained sufficient money from Mr. Forman and from petty cash to make up the pay roll for the preceding week; is that correct?

A. That is right.

Q. And then you took these various envelopes back to the plant and paid the men?

A. Yes.

Q. Mr. Forman advanced some of his personal funds in that circumstance, didn't he?

A. Yes, he did.

RICHARD M. HENDERSON, sworn.

BY MR. MILLER:

Q. You are an employee of Self-Drive It Corporation, are you, Mr. Henderson?

A. Yes.

Q. What service do you render to Self-Drive It Corporation?

A. I am city manager for the Self-Drive It Corporation in charge of the 23rd Street office and in

charge of the rentals at the airport and so forth. We have an office in the motel at the airport.

Q. Who is your superior, or to whom do you account for your part of the operation of the business?

A. Mr. Robinson.

Q. You heard testimony today with respect to a certain pay roll check for the week of October 19, 1956. Did you have anything to do with that check personally?

A. No. The only thing I had to do with it personally was when Mr. Robinson came to me and told us we were not going to be paid because Mr. Forman would not sign the check. Mr. Forman, in front of everyone in the office, said that he wouldn't sign the pay roll check.

Q. Were there any words in your presence between Mr. Forman and Mr. Robinson on that occasion?

A. Well, it didn't seem that Mr. Robinson was upset, but Mr. Forman was very upset at the time he said he wouldn't sign it, and he wouldn't give us a reason for not signing it.

* * * (N. T. pp. 23 and 24.)

CROSS-EXAMINATION.

BY MR. JONES:

Q. Mr. Henderson, were you not asked to present the check for $29,000 to Mr. Forman?

A. I was.

Q. Did Mr. Forman make any statement to you as to why he would not sign that check?

A. No, he didn't.

Q. Did Mr. Forman not say to you that he would not sign this check until the pay roll checks were presented and signed?

A. No, he didn't.

Q. He made no statement of any kind along those lines?

A. No, he did not, sir. When I gave Mr. Forman the check for the $29,000, he said to me, "I am not signing any checks," and he gestured with his hands and that is all. He did not give me any reason at all for not signing the checks.

Q. He did not give you any reason at all for not signing the checks until the pay rolls were paid?

A. No, he did not, sir.

* * * (N. T. pp. 24 and 25.)

(Continued until November 28, 1956, at 3:00 o'clock P. M.)

ORDER OF COURT APPOINTING LIQUIDATING RECEIVER.

AND NOW, to wit, this 28th day of November, A. D. 1956, upon consideration of the shareholder's

petition for the appointment of a Receiver, pursuant to Sections 1107 and 1108 of the Business Corporation Act of 1933, as amended, and upon hearing held thereon and proof of the issues, and upon consideration of the report of the temporary Receivers, and the recommendations therein contained, and on motion of MILLER, ADELMAN & LAVINE, Esquires, attorneys for the temporary Receivers, IT IS HEREBY:

ORDERED, ADJUDGED, AND DECREED, as follows:

1. That Irwin Apfel, Esq., be, and he is hereby appointed liquidating Receiver of all of the assets, property, franchises, rights, privileges, whether real, personal or mixed, of whatever kind and description and wheresoever situate, of SELF DRIVE IT CORP., including but not limited to its lands, tenements, buildings, motor vehicles, plants, machinery, tools, outlets, merchandise, inventory, license agreements, lease agreements, shares of stock, bills and accounts receivables, cash on hand and in bank, contract rights and choses in action, income, profits, privileges, books of account, records, files, correspondence, and all other books, papers and accounts, deeds, and muniments of title.

2. That the said Receiver be, and he is hereby, authorized and empowered to:

(a) Demand, sue for, collect and take possession of all of the property, assets and effects above described or referred to wheresoever situate or found.

(b) Preserve the said property, assets and effects in the proper condition so that they may be advantageously and economically liquidated.

(c) Collect all amounts owing to said SELF DRIVE IT CORP. by shareholders on any unpaid portion of the consideration for the issuance of shares of stock.

(d) Employ such persons and make such payments and disbursements as in his discretion may be needful and proper in the preservation, protection, management and liquidation of the aforesaid property, assets and effects.

(e) Bring, commence, prosecute and defend at law or in equity, in his own name as Receiver of SELF DRIVE IT CORP., all suits and actions which, in his judgment, he deems appropriate or necessary for the preservation, management, protection, and liquidation of the aforesaid property, assets, and effects.

(f) Subject to the order of this Court, sell, convey and dispose of the aforesaid property, assets and effects of SELF DRIVE IT CORP. in bulk at private

sale, and, to this end, shall forthwith attempt to secure an offer, or offers, for the purchase thereof upon such terms as the Receiver shall determine and as shall be approved by the Court.

(g) Compound a settlement with a debtor of SELF DRIVE IT CORP., with persons having possession of property, belonging to SELF DRIVE IT CORP., or with persons in any way responsible at law, or in equity, to SELF DRIVE IT CORP., upon such terms and in such manner as Receiver shall deem just and beneficial to SELF DRIVE IT CORP.

(h) Perform all duties imposed upon him or required by law.

3. The existing amount of security posted by the Receiver shall continue until further order of the Court;

(a) The Officers, Directors, shareholders, agents, servants, and employees of SELF DRIVE IT CORP. be, and are hereby, restrained and enjoined from selling, transferring, concealing, disposing of, or in any manner interfering with any of the property of SELF DRIVE IT CORP., or from taking possession of, or in any way interfering with the possession or management of any of the property over which the Receiver is hereby appointed, or doing any act or thing to prevent the proper discharge by the Receiver of his duties under the Order of this Court.

(b) All of the creditors and shareholders of SELF DRIVE IT CORP. be, and they are hereby, enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity, or bankruptcy, or otherwise, against SELF DRIVE IT CORP., or foreclosing upon, selling, or in anywise disposing of any of the property held as security for loans made to the SELF DRIVE IT CORP. without leave of this Court, or the approval of the Receiver first had.

(c) The Receiver shall forthwith liquidate the property, assets, effects and affairs of SELF DRIVE IT CORP., and shall account to this Court with respect to same.

KUN,
J.

HEARING.

Philadelphia, Pa., November 28, 1956.

Before: HON. JOSEPH L. KUN, P. J.

Discussion

THE COURT: This is a hearing, a continued hearing, is it not, on a petition to have a permanent receiver appointed?

MR. MILLER: Yes, sir.

MR. JONES: That is right. At the last hearing I made representation to the Court that I desired to file certain exceptions. Events after that—since then we have had two business days, Friday and Monday—events after that had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a permanent receiver and move on from that point, your Honor.

MR. MILLER: If it pleases your Honor, although the term "permanent receiver" is used, we speak of a "liquidating receiver" within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.

THE COURT: Oh, I see. That is the correct term, is it, "liquidating receiver", rather than "permanent receiver"?

MR. MILLER: That is right. Your Honor will note that in the original application filed there was no charge or suggestion of fraud, mismanagement or misappropriation of funds, but rather, the stockholders' petition, as filed, alleged a deadlock of the

directors and stockholders and am impasse existed. That is the basis for bringing this action, as provided for in the Business Corporation Act of 1933, sections 1107 and 1108 thereof, which further provides that upon final hearing, the Court shall thereupon appoint a liquidating receiver.

* * * (N. T., pp. 28 to 30, inclusive.)

MOTION UNDER RULE 251 (c) TO QUASH, SET ASIDE, AND DISMISS THE ABOVE PROCEEDING.

AND NOW, to wit the 7th day of December, 1956, come M. Alexander Forman, Stockholder, Director, Secretary and Treasurer of the Self Drive It Corporation and Betty Forman Stockholder and Director of the Self Drive It Corporation, by their attorney, J. Webster Jones, Esq., and move the Court to quash, set aside and dismiss the above proceeding for the following reasons:

(1) The said petition was filed with the Court under the provisions of the Business Corporation Law of Pennsylvania (Act of May 5, 1933, P. L. 364, 15 P. S. 2852-1107 to 1112), the orders, decrees and actions of the Court were predicated upon the said petition; and the said Act, i. e. the Business Corporation Law of Pennsylvania, 15 P. S. 2852-1107 to 1112 are unconstitutional since the said Act violates the

Fourteenth Amendment of the Constitution of the United States providing inter alia:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

being U. S. Code Annotated, Constitution, Amendment Fourteen, Page 69.

(2) The Court in entertaining the said petition and granting all orders thereunder has acted upon an ex parte petition unsupported by any affidavits, which petition merely set forth conclusions in part in the words of the unconstitutional provisos of the Business Corporation Law.

(3) Since there is no proof in the entire record that the things set forth in the petitions heretofore filed exist as matter of fact.

(4) The Court erred in appointing temporary receivers.

(5) The Court erred in appointing a liquidating receiver.

(6) The Court erred in directing the receiver to sell at private sale.

(7) It is improper to order the receiver to sell at any sale other than a public sale after due hue and cry and public advertisement and notice to all persons and upon competitive bids.

(8) The Court erred in failing to judicially note and regard that all creditors are secured creditors; that the assets of the corporation exceed its liabilities by an amount in excess of $100,000.00; that there is no danger that the affairs of the corporation or its assets will be adversely affected; that a liquidating receiver is not necessary; that it is not to the best interests of the corporation and its share holders that its said assets be sold.

HEARING.

Philadelphia, Pa., December 10, 1956.

Before: HON. JOSEPH L. KUN, P. J.

THE COURT: In the matter of Self Drive It Corp., I see that there are a number of items on my docket.

* * * (N. T., pp. 32 to 35, inclusive.)

MR. MILLER: My friend, Mr. Jones, now opens

the door to other matters that have suddenly appeared on the record. He has already offered a general appearance.

THE COURT: Yes.

MR. MILLER: And now he has filed an order for a special appearance. I am sure the Court will take cognizance of the fact that at the first hearing in this matter Mr. Jones entered, at your Honor's request, a general appearance and participated in the hearing on the merits of the original petition and application.

THE COURT: He certainly did at the last hearing on the application of the Petitioners for the appointment of a Liquidating Receiver, who I had described for a while as a permanent Receiver, but who, under the Statute, I think, is referred to as a Liquidating Receiver. Is that it?

MR. MILLER: That is right. And before the hearing started your Honor called on Mr. Jones as to whether or not he had filed his appearance, your Honor asked him whether or not he had filed his appearance, to which he said he did, and that was a general appearance in these proceedings.

THE COURT: He certainly did. There is no question about that, and he certainly participated in the hearing for all purposes. I have looked at the

notes of testimony and I find there a statement by Mr. Jones agreeing, in plain language, to this appointment. Therefore, it comes with bad grace for him to try to put in a special appearance now to try to question the proceedings. Have you seen the notes of testimony?

MR. JONES: No, sir.

THE COURT: Have you seen your statement?

MR. JONES: No, sir.

THE COURT: I suggest you read it.

MR. JONES: I recall the circumstances very clearly.

THE COURT: Don't recall anything. I suggest that you read it.

MR. JONES: When the Court used the words "permanent receiver", I went along. When you said "liquidating receiver", I withdrew and said I would not agree to the liquidating receiver.

THE COURT: The record will show what it shows.

MR. JONES: That is right; it will show what it shows.

THE COURT: It shows just what I told you and you have no standing whatsoever on that point. Furthermore, your attempt to enter a special appearance here will be absolutely useless. However, the other questions involved will be disposed of eventually, each in turn as required.

* * * (N. T., pp. 37 to 41, inclusive.)

MR. MILLER: Now there has been filed of record an attack against this entire proceeding, viz., a petition for a turnover order and exceptions ——

MR. JONES: I beg the Court's pardon. That matter is not before the Court on any phase of it.

MR. MILLER: I did not say it was before the Court.

THE COURT: What matters are you talking about?

MR. JONES: The matter of the petition and the exceptions that have been filed attacking the entire procedure.

THE COURT: They are before me. They are on the book, the docket here, for disposition, for hearing or argument on them, or whatever is to be done about it. Why say they are not before me.

MR. JONES: I don't know how they can be before you. They were not ordered there by me.

THE COURT: I ordered them down. I told the Clerk to put them on the same list so that I would have all these matters before me.

MR. JONES: I didn't know that. I didn't come prepared to proceed on that basis.

THE COURT: You will have to be prepared, because we have to get this out of the way before the 19th.

MR. JONES: All right, sir.

THE COURT: If you are not prepared to do it today, you may do it at some early date.

MR. JONES: This is the first knowledge that I have that the Court ordered them on the list.

THE COURT: Here they are. They had to be ordered down so that they could be disposed of.

MR. JONES: I know that somebody has to do it and it is usually for counsel to do it.

THE COURT: It has to be done before the return date on that other thing, you know.

MR. JONES: I understand.

THE COURT: Since you are not prepared to discuss these matters today, you indicate a time when you can do so. Today is the 10th. It has to be done with reasonable dispatch. In general, you are raising, I think, the question of the constitutionality of the Act fundamentally?

MR. JONES: That is right.

THE COURT: The whole Act?

MR. JONES: No, no. Pardon me.

THE COURT: No?

MR. JONES: I raise the question of a part of it and by special designation that part of it having to do with involuntary dissolution.

THE COURT: Whatever it is, you raised some question about the unconstitutionality of what you consider to be the applicable part of the Act?

MR. JONES: That is right.

THE COURT: We have to have argument on that and I would like to have it as soon as possible. In that connection you have to study this question: If the record shows, as it does, your agreement to the appointment of the Liquidating Trustee, Receiver,—if it does show that; I read it and that is the way I understand it; you read it the way you want,—the

legal question that I am now putting to you to study in connection with the other legal points that you are going to present to me is whether you can raise that question after such an agreement, if there was such an agreement. If you can, all right of course, and you may proceed further with it, or if you believe that you did not make such a statement, as I think you did, or if the record does not justify my statement, then of course you certainly can raise the question.

MR. JONES: Let me clarify my statement on that with you.

THE COURT: Will you please do that? Of course you cannot clarify anything that is on the record. What is there is there. It is indelibly there. You cannot change it and all I want to know now is a date when you want to submit argument to me.

* * * (N. T., 44 and 45.)

(Adjourned until Friday, December 14, 1956, at 3 o'clock P. M.)

OPINION SUR MOTION TO QUASH PROCEEDINGS AND SUR EXCEPTIONS TO ORDERS AND DECREES.

KUN, P. J.

There is perhaps no case on record where motions, exceptions, etc. such as filed on behalf of M. Alex-

ander Forman, a principal shareholder, were filed with less justification than in this case, as will readily be seen from the following recital of the proceedings:

The above named Self Drive It Corp. is practically a two-man corporation, certain shares of stock having been issued in equal parts to Richard S. Robinson and to Forman, with one share to the wife of each for qualifying purposes. The stock being equally divided, neither side had control. The shares issued to Robinson and Forman were not fully paid for, and when the Liquidating Receiver was appointed, he called upon each of the parties to pay the balance due on the shares issued. Robinson paid up and Forman refused, whereupon the Receiver obtained a rule against Forman to show cause why he should not be directed to pay the balance due on the shares issued to him, some $9,000.00, or surrender the shares of stock held by him in that amount. Although, as stated, Robinson paid the sum of $9,000.00 in cash to the Receiver—the amount due on the shares issued to him—Forman filed an Answer to the Receiver's petition that the shares were to be paid for by services to be rendered by the parties to the corporation, although there was no such corporate action. Inasmuch as the corporation appears to be entirely solvent, and no rights of creditors are involved, this part of the proceedings has been continued by the Court for adjustment on eventual distribution.

The proceedings were instituted under Section

1107 and 1108 of the Pennsylvania Business Corporation Law of 1933, on the allegation to the effect that the persons named, being the only persons in interest, had come to a disagreement or deadlock in the management of the corporation which they were unable to resolve, and asked for the dissolution of the corporation. Temporary receivers were appointed, followed by a hearing as required by the statute, at which the parties in interest, their attorneys and witnesses were present and heard in open court. J. Webster Jones, Esquire, appeared with M. Alexander Forman, the other principal shareholder, and cross-examined the petitioning shareholder, Robinson. No contradictory testimony was offered because it appeared quite clearly from the testimony of Robinson and other witnesses called that an impasse had indeed been reached between Robinson and Forman, so much so that when a note of the corporation fell due, Forman refused to sign a renewal thereof for a while, and Robinson had to take care of the situation in the interim by his personal assurances to the bank which held the note. It was also disclosed at the hearing that Forman refused to sign and issue checks for the payroll of the corporation employees, who, however, were later paid by cash on hand. Under all the circumstances, the necessity for the petitioner's action begun under the statute was quite apparent. The corporation being solvent and no fraud being claimed, the only remedy petitioner had was under the statute *Bowman v. Gum Inc.*, 321 Pa. 516.

Since the parties had not resolved their differences in the meantime, the Court, in due course as required by the statute, on appropriate petition, allowed a Rule to Show Cause why a Liquidating Receiver should not be appointed. On the return date of this rule, J. Webster Jones, Esquire, again appeared for Forman and asked for a week's continuance, to consider further steps in the matter. This continuance was granted. At the continued hearing, when the case was called, Mr. Jones made the following statement to the Court:

> "MR. JONES: That is right. At the last hearing I made representation to the Court that I desired to file certain exceptions. Events after that—since then we have had two business days, Friday and Monday—events after that had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a permanent receiver and move on from that point, your Honor."

Counsel for the petitioner then drew the Court's attention to the fact that the correct designation of the appointment under the statute was "liquidating receiver". The Rule to Show Cause so stated. Whereupon, there being no objection to the appointment and, on the contrary, specific agreement thereto, the Order appointing the Liquidating Receiver was made. The record shows, immediately after Mr. Jones' statement, the following:

> "MR. MILLER: If it pleases your Honor, al-

though the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.

"THE COURT: Oh, I see. That is the correct term, is it, 'liquidating receiver', rather than 'permanent receiver'?"

Thereafter, the Liquidating Receiver asked leave to sell the assets of the corporation at a private sale in bulk, to the highest bidder. The statute specifically provides that the assets may be sold either in bulk or at private sale, whichever is more suitable to the nature of the business. In this case, we do not have a manufacturing company, or a merchandise company with assets on the ground. The business of the corporation is rendering service by renting out automobiles to persons at certain rates for self-driving, and the automobiles so rented out are scattered at various parts of the country, in process of use. It is apparent, therefore, that this is the kind of a business that can not very well be sold at public sale, piecemeal, but must be sold in bulk as a going concern. The Liquidating Receiver was therefore given the authority to contact persons or corporations all over the United States who might be interested in purchasing a business of this kind. The petitioner made an offer to the Liquidating Receiver which was recited in the petition and, of course, Forman, the other principal shareholder, and any other person has the same right to make an offer, and the

sale will be made to the highest bidder. The purpose of the proceeding is to get the highest possible price for the assets of the corporation, so that the best possible distribution can be made between the parties.

Each step in these proceedings has been taken in strict accordance with the Pennsylvania Business Corporation Law of 1933, and there is not the slightest merit in the blanket exceptions to the orders and decrees entered in this case, especially considering the agreement to the appointment of the Liquidating Receiver made in open court, as noted above. Likewise, there is no merit whatever in the motion made to quash, set aside and dismiss the proceedings. Such action on the part of a person who has agreed to such an appointment is perhaps without parallel in the records of this Court.

One additional point may be noted. After counsel for Forman appeared at the initial hearing, and thereafter at the hearing on the rule for the appointment of a liquidating receiver, and secured a continuance, and at the continued hearing agreed to the appointment of the Liquidating Receiver, he nevertheless filed a "special appearance". Such action is meaningless, because a special appearance is permissible only for the purpose of questioning the jurisdiction of the Court. In the matter before us, there is no basis whatever for filing such an appearance. The Court has complete jurisdiction of the subject matter and of the persons involved. Moreover, a special appearance to challenge the jurisdiction of

the Court cannot be filed after the party has appeared in court, represented by counsel who has taken part in the proceedings by examination of the witnesses, and especially in this case where he agreed in open court to the appointment of the Liquidating Receiver. While a motion has been filed to strike off this "special appearance", it is unnecessary to do so, having no significance as such. It is in legal effect a general appearance, by its own terms, despite its label, confirming the fact of general appearance on the part of Forman by representation by his counsel in the court proceedings in this case, which appearances appear of record.

The Exceptions are dismissed as is also the Motion to Quash, Set Aside and Dismiss the proceeding.

BY THE COURT:

/s/ KUN,

P. J.

December 19, 1956.

I concur.

/s/ HAGAN,

J.

Hearing
Discussion

HEARING.

December 19, 1956.

Before: HONORABLE JOSEPH L. KUN, P. J.

THE COURT: The matter that we have before us now is the Self-Drive It Corporation matter.

I believe this is the return date of the order entered by the Court on a petition for leave to sell at private sale under the conditions therein mentioned, in which there was incorporated, I believe, an offer received by the Liquidating Receiver, as set forth in the petition.

Is that the matter before the Court today?

MR. MILLER: That is correct, sir.

May I make certain statements for the record?

THE COURT: Yes, certainly.

MR. MILLER: There has been filed with the Clerk's Office and duly docketed the following affidavits of service of notice of this hearing, to wit:

upon J. Webster Jones, Esq., attorney for Betty Forman and M. Alexander Forman, in which notice there was enclosed a copy of the petition and the order of this Court dated December 5, 1956, together with all of the exhibits which the Court has designated to be attached to such notification; an affidavit of service of notice of this hearing on all creditors and other parties in interest; and an affidavit filed by the Liquidating Receiver, to which has been attached copies of letters of invitation to bid, which has gone forth to the public and in which letter there is incorporated copies of the petition and the order of this Court with respect to the request of the Liquidating Receiver to sell at private sale in bulk all of the assets of Self Drive It Corporation; and a copy of the inventory and appraisement, dated October 25, 1956, filed of record; also, a copy of the license agreement referred to in the petition and order by and between the Avis Drive It Yourself Corporation, licensor, and Self Drive It Corporation, licensee.

I wish to state for those present and for the record a notification sent by J. Webster Jones, Esq., to Irwin Apfel, Liquidating Receiver, which Mr. Jones, for Betty and M. Alexander Forman, stockholders of Self Drive It Corporation, has in writing requested the Liquidating Receiver to announce at this time for the benefit of all prospective bidders that on behalf of his clients, Betty and M. Alexander Forman, he may take an appeal or appeals to a higher court or courts, attacking the proceedings upon which this sale is based.

THE COURT: I can supplement that by the fact that I have been informed by letter from Mr. Jones just before I came on the bench that he has taken such an appeal.

Yesterday Judge Hagan and I dismissed the exceptions and motion to vacate the proceedings heretofore taken in this matter, and this morning we filed an opinion stating our reasons for it. Since then Mr. Jones has taken an appeal from that, and he has so notified us.

MR. MILLER: May I call to Your Honor's attention that I believe the statutes of Pennsylvania with respect to appeals do not provide that the mere taking of an appeal shall act as a supersedeas until bond has been filed or supersedeas issued?

THE COURT: It certainly does not act as a supersedeas, and the Court will proceed with the matter as is required by the circumstances. Therefore, you may go ahead.

* * * (N. T., pp. 4 to 13, inclusive.)

MR. JONES: Now, sir, I would like very clearly on the record at this moment ——

THE COURT: Will you state your name, please?

MR. JONES: I am J. Webster Jones. I represent M. Alexander Forman and Betty Forman. Mr. For-

man is a director of the corporation. He is secretary and treasurer of the corporation—or was. He is a stockholder holding 99 shares, and his wife, Betty Forman, holds one share of the stock—being equal stockholders with Mr. Robinson.

I desire to place upon the record, so that it may formally appear at all times, that an appeal from the order of the Court dismissing our motion to quash and dismissing our exceptions was filed with the Supreme Court of Pennsylvania on this date and was lodged with the Prothonotary of this Court at approximately 2:35 on this date.

THE COURT: I think we made such an announcement.

MR. JONES: I want to make very clear that it is on the record, sir.

THE COURT: There is no doubt about it that it is on the record.

MR. JONES: And, sir, I move the Court —— By saying that that appeal has taken the matter from the jurisdiction of the Court as of the present moment and at the moment that the appeal was lodged with the Prothonotary, I move the Court that the Court vacate what has been done today, because the matter is not now in the jurisdiction of the Court.

However the Court may view that, I have one other application to make, sir. I ask a one-week

period of time within which to submit other bids, that are in the offing but I am not in a position to submit today. One of the matters has come up within the last half-hour.

THE COURT: Well, of course, I am very glad to do it, but you state a sort of contradictory position. I don't know whether you realize it or not. You first tell me that the matter is not before the Court because you appealed.

MR. JONES: That's right.

THE COURT: Next you want me to continue the matter for a week to give you an opportunity to submit some bids that are in the offing, as you say, that might improve the present bid.

MR. JONES: That's correct, sir.

THE COURT: I am perfectly willing to grant that application, because the purpose of the proceeding, as I take it, is to get the highest possible amount for the asset that is being sold. And, of course, if more can be obtained for it, it is a result devoutly to be desired, and I am inclined to grant that application.

* * * (N. T., pp. 15 to 32, inclusive.)

OPINION SUR EXCEPTION FILED BY M. ALEXANDER AND BETTY FORMAN.

While counsel for the exceptants stated at the argument that he filed the exception on January 14, 1957 merely to "protect the record", and was not to be argued, since the exception was directed to the action of the Court confirming the sale of assets on January 8, 1957, which action it is claimed was without lawful authority because of the pendency of an appeal in the Supreme Court entered on December 19, 1956, it is deemed necessary to pass on the exception.

In the Opinion filed by us on December 19, 1956, dismissing exceptions theretofore filed by the same exceptants, at which time the motions to quash and to set aside the proceedings were also dismissed, it was pointed out how baseless the position of the exceptants was, having agreed in open court to the appointment of a liquidating receiver, who was appointed in the proceedings instituted under Sec. 1107 and 1108 of the Pennsylvania Business Corporation Law of 1933, and not a proceeding in equity, as erroneously assumed by the exceptants in filing their appeal in the Supreme Court. As we pointed out in that Opinion, it was ruled in *Bowman v. Gum*, 321 Pa. 516 that equity has no jurisdiction in a matter such as this and the proceeding must be taken under the Business Corporation Law.

We pointed out in that Opinion that on the return date for the appointment of a liquidating receiver,

November 21, 1956, the same exceptants appeared by counsel and asked for a continuance of the hearing which though opposed by other parties in interest was granted. The matter was continued until November 28, 1956. It was at this hearing that the exceptants b ycounsel agreed in open court to the appointment of a liquidating receiver (mistakenly referred to at one point as "permanent" receiver. which was promptly corrected), as pointed out in our Opinion of December 19, 1956. Following the appointment of the liquidating receiver, he filed a petition under the Act to sell the assets in bulk at private sale, because of the nature of the business, for the reasons stated therein, upon which an Order was made authorizing such sale under conditions set forth, returnable December 19, 1956. On that date the exceptants again appeared by counsel to advise that they had taken an appeal to the Supreme Court. but as the record was still before the Court, and no supersedeas had been granted and bond filed, as required by applicable statutes, it was obviously necessary to proceed with the matter as required by the Business Corporation Law, since certain restraining orders and turnover orders had been made, and creditors had been enjoined from prosecuting their claims pending liquidation. The exceptants by counsel asked for a continuance to enable them to submit a bid which application was granted against the strong opposition of the other parties in interest, including creditors. While counsel for the exceptants had asked for a week's continuance, we granted

a continuance of nine days, until December 28, 1956.

The matter was heard again on the postponed date, to wit, December 28, 1956, when for reasons stated in the record, the exceptants by the same counsel again participated in the proceedings by asking for a further continuance because of some alleged difficulty in contacting persons from whom the exceptants expected to secure funds to enable them to bid. Again against the strong objections of the other parties in interest, the Court postponed the matter until January 8, 1957, on counsel's absolute assurance he would request no further continuance of the matter, as he expected to be in a position to bid on the postponed date. This turned out to be true, because on the postponed and final date for the sale, January 8, 1957, the exceptants by their counsel presented a check for $25,000 to the Receiver, as required by the terms of the sale to qualify as bidders, and proceeded to actively engage in the bidding, running it up to something over $90,000 above the original bid, all of which appears in detail on the record. The first bid made by the exceptants through counsel was $600,000 which, through the bidding, was run up by the exceptants to $660,000, but when Allen Weinberg bid $665,000, Mr. Jones, attorney for the exceptants, stated: "I have no further bid, sir." However, counsel for the petitioner Robinson then made a bid of $666,000, which started Mr. Jones again for the exceptants by bidding $667,000. The exceptants, through Mr. Jones, ran up the bidding to $672,000, after which Allen Weinberg bid $673,000, where-

upon Mr. Jones for the exceptants again stated: "No further bidding". No further bidding was made by anyone, whereupon the sale was confirmed to Allen Weinberg in the sum of $673,000, in open court, without any exception or objection thereto from exceptants or any one else. The successful bidder then and there made an additional deposit as required by the terms of sale, in addition to the $25,000 qualifying deposit previously made by him. The qualifying deposits in the same amount made by the unsuccessful bidders (including exceptants) were returned to them.

After thus participating extensively in the proceedings, from the beginning as outlined in the Opinion of the Court heretofore filed on December 19, 1956, and thereafter as further recited herein, particularly in the bidding on January 8, 1957 and standing by without objection to the confirmation of the sale to the highest bidder, the exceptants nevertheless filed the exception now before the Court six days later, on January 14, 1957 which, to say the least under the circumstances mentioned, was a most extraordinary action on their part (unless, as stated by their counsel, it was merely done to "protect the record").

The mere fact that the exceptants had taken an appeal to the Supreme Court, and had a certiorari issued to this court, did not ipso facto act as a supersedeas and stay the proceedings here. The exceptants continued thereafter, as hereinbefore set forth, to actively participate in the proceedings. Such par-

ticipation, as recited, by the exceptants in the proceedings to final sale, the bidding in which they participated, and standing by without objection when the sale was confirmed to one who had outbid them, may be regarded as an abandonment of their appeal which was never perfected by a supersedeas and bond. However that may be, the mere fact of the appeal and certiorari did not have the effect of staying proceedings such as we have before us. So far as the certiorari filed in this case is concerned, we were advised by the Prothonotary that it is returnable the third Monday in April, 1957, and it is the practice of his office to prepare the record and make the return about a week before the return date. Even if the certiorari is considered effective when filed, a certiorari is not a supersedeas. No doubt the Supreme Court in circumstances requiring it could direct a certiorari "forthwith". This is done on appeals from preliminary or special injunctions, but such an appeal does not of itself act as a supersedeas even though the record is removed from the court below (12 P. S. 1101). And as to general injunctions or relief in the nature thereof, an appeal does not act as a supersedeas unless bond is entered, as provided in 12 P. S. 1142. Whatever the nature of the proceedings, there is no doubt that they may be superseded by an order either of this court or of the Supreme Court and the filing of a proper bond to pay the costs and any damages resulting from the taking of what might turn out to be a baseless appeal. No such steps were taken by the exceptants in this case.

Exceptants have cited the case of *Harwood v. Bruhn*, 313 Pa. 337, for the proposition that the filing of an appeal and certiorari ipso facto acts as a supersedeas. However, all that that case decided, as quoted from an earlier case at page 341, was that: "At common law a court of first instance is without jurisdiction to proceed with a cause after the record thereof has been removed to an appellate court. This rule still applies in the absence of a statute providing otherwise." The Supreme Court added, referring to the proceeding before it: "Here, there is no such statute". Indeed, there could not be. Involved there was the question of the striking off of a judgment entered on a bond by the court below. After the removal of the record on appeal, the lower court made absolute the defendant's rule against plaintiff, requiring him to enter security for costs. Both orders were reversed. The common law rule was applied because there was no statute to the contrary in the circumstances of that case, obviously not, in the situation there present, because the lower court had, as stated, stricken off plaintiff's judgment so that plaintiff could not proceed. On an appeal from that kind of an order, no question of a supersedeas could be involved, so far as plaintiff-appellant was concerned. In that situation there was no interest to protect against damages by the delay caused by the appeal, because by striking off the judgment, the court below effectively stopped plaintiff from proceeding. It was to correct this that plaintiff appealed, and in the meantime nothing could be done

against the defendant. Hence there was no room for the application of a supersedeas requiring any bond to be filed by the plaintiff. It was in that situation that the court held the taking of the appeal and service of the certiorari acted as an "implied supersedeas"; and prevented the lower court from entertaining a rule on the plaintiff to enter security for costs. Moreover, the plaintiff in that case had a judgment, which was another reason why he could not be required to file a bond for costs. The case has never been referred to since because obviously in the situation there present no special supersedeas or bond could on any possible theory be required of the plaintiff-appellant, as the other party, the defendant, could not be damaged by the delay incident to the appeal. There were no adverse interests to protect by bond. If, on the contrary, in that case the lower court had refused to strike off the judgment, or refused to open the judgment, or refused to stay execution (in a situation where the judgment was properly entered but not yet collectible), and it was the defendant who would have appealed, then it is clear that under applicable statutes the mere taking of an appeal by him would not have stayed the plaintiff's proceedings in the court below, but the defendant would have had to obtain a supersedeas and file a bond. *Geiger v. U. S. Fidelity and Guaranty Co.*, 121 Pa. Superior Ct. 555, in which at p. 559 the court said: "As no supersedeas was specially allowed by the court below or by the Supreme Court, it follows that the appeal taken did not act

as a supersedeas and the petition to stay the writ of fieri facias should have been refused." The applicable statute is sec. 12, Act of May 19, 1897, P. L. 67. It is interesting to note that the appellant in that case had actually filed a bond, but the court held that the appeal and the bond do not themselves act as a supersedeas which must be specially allowed by either the court below or the Supreme Court.

In *Shinn v. Stemler*, 159 Pa. Superior Ct. 129, which was an appeal by defendant from the order of the court making the rule absolute for citation for the possession of real estate, the court said at p. 130: "The question presented is whether that appeal nevertheless acted as a supersedeas. It did not. The Act of May 19, 1897, P. L. 67, as amended, 12 P. S. Par. 1133 et seq., rules appeals on the question of supersedeas; and a supersedeas operates only in favor of those who ask for and have done those things necessary to obtain it. *Drabant v. Cure*, 280 Pa. 181, 187, 124 A. 340; *Koenig v. Curran's restaurant & Baking Co., et al.*, 121 Pa. Superior Ct. 201, 205, 207, 183 A. 451."

That the mere fact of filing an appeal, even with bond, does not act as a supersedeas was again pointed out in a note to *Kogen v. Horowitz*, 169 Pa. Superior Ct. 349, at 351.

The appeal entered by the exceptants in this case and captioned according to their notice in the Supreme Court as No. 193, January Term, 1957—returnable the 3d Monday of April, 1957, is stated under the heading "Nature of Case" as "Receiver-

ship in Equity", as taken from "the order and judgment" of this court. We have previously pointed out the proceeding is not in equity. The appeal does not designate the "order or judgment" appealed from. We had made a number of orders but have entered no judgment. However, we made orders appointing a liquidating receiver (to which exceptants agreed in open court, as the record shows); orders directing the turnover of the assets of the corporation to the receiver; injunctions against creditors from proceeding with their claims, and enjoining officers and directors of the company from interfering with the management of the business; and enjoining the exceptants themselves from transferring their stock (which allegedly had not been fully paid for).

It is perfectly clear that the appeal from such orders does not act as a supersedeas, and to stay proceedings in this court a supersedeas must be obtained either from this court or from the Supreme Court, and is not effective without the entry of an adequate bond. 12 P. S. secs. 1101, 1138, 1140, 1149, 1152.

Indeed, Appeal Rule 67 of the Supreme Court itself regulates "Petitions for the allowance of * * * a supersedeas", which is the final answer to the contention of the exceptants that the filing of their appeal and certiorari acted as a supersedeas so that the court had no right to proceed. The contention is not only without the slightest merit but comes with bad grace from the exceptants, in view of the utmost

consideration given them throughout the proceedings, granting their every request for a continuance, and participating as they did actively in the proceedings throughout, including their bidding at the final sale, which was confirmed in open court in their presence without any objection from them or any one else.

Considering the nature of the exception filed, it is necessary for the court to dispose of it. Accordingly, the exception is dismissed.

If the exceptants deem it necessary to have an exception to the court's action, the exception is now entered for them.

BY THE COURT:

KUN,

P. J.

January 30, 1957.

FINAL ORDERS.

10-24-56. Order made appointing Irwin Apfel, Esq. and David Cohen, Esq., Temporary Receivers.

12-18-56. Motion of M. A. Forman, et al., to quash etc. dismissed.

Office - Supreme Court, U.S.
FILED
JAN 16 1958
JOHN T. FEY, Clerk

No. 726
Term, [redacted] 1957

IN THE

Supreme Court of the United States

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*

v.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

THOMSON F. EDWARDS,
20th Floor,
Fidelity-Phila. Trust Building,
Phila. 9, Pa.,
J. WEBSTER JONES,
500 Land Title Bldg.,
Phila., Pa.,

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MISCELLANEOUS:

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17 Fed. Digest (West Reporter System) Constitutional Law, Key No. 309 (1), p. 721 15

Willis on Constitutional Law, 1936 Edition, pp. 664, 665 16

IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 195

No.

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*

v.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of Pennsylvania which was entered on September 30, 1957. The jurisdiction of this court is invoked under the provisions of the United States Constitution, the Fourteenth Amendment thereto—"nor shall any State deprive any person of life, liberty or *property*, without due process of law;—", because the court below held a statute of Pennsylvania constitutional which permitted the court to appoint a receiver for a solvent going corporation without notice to the corporation or other stockholders, without an opportunity to be heard.

OPINION BELOW.

The opinion of the Common Pleas Court sur motion to quash the proceedings and sur exceptions to orders and decrees of the Common Pleas Court of Philadelphia County is as printed in the "Record" for the use of the Supreme Court of Pennsylvania, below, on P. 44a-50a.

In the Appendix B hereto, infra, P. 20, as reported in 390 Pa. 161; 134 A. 2d 662, et seq., is the opinion of the Supreme Court of Pennsylvania from which this appeal is taken.

JURISDICTION.

This suit was brought in Common Pleas Court No. 1 of Philadelphia County, Pennsylvania, when a stockholder presented a petition to a Judge of that court, in chambers, asking for the appointment of temporary receivers for a solvent going corporation. The court forthwith allowed the petition in chambers without notice to the corporation or other stockholders and the receiver immediately took charge of all of the property of the corporation. Thereafter, the appellants who own 50% of the stock of the corporation filed a motion under Rule 251(c) of the Common Pleas Court to quash and set aside the appointment of temporary receivers as being without due process since it lacked notice and an opportunity to be heard. The Court dismissed the petition to quash. An appeal was taken, to the Supreme Court of Pennsylvania, assigning that the appointment of the temporary receivers was without due process and that the Statute of Pennsylvania, the Business Corporation Law, 15 P. S. 2852-1107 et seq. under which the proceeding was brought was unconstitutional since it lacked due process and deprived the appellants of their property without due process. The Supreme Court of Pennsylvania upheld the validity of the statute. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code Annotated §1257(2).

QUESTION PRESENTED.

Whether there is an unconstitutional lack of due process as required under the Fourteenth Amendment of the Constitution of the United States, where a judge of a Common Pleas Court, under a State statute, in chambers, upon an ex parte petition, sworn to by petitioner, but unaccompanied by any supporting affidavits, without notice or opportunity to be heard, appoints temporary receivers for a solvent going corporation thereby divesting the owners of fifty percent of the stock of the corporation of their stock and the business; and whether any action of the shareholders, who own fifty percent of the stock of the corporation in thereafter contesting the receivership of the corporation and the further handling of the void action can or does cure, validate or make lawful the unconstitutional void action of the Court in originally appointing the temporary receivers without due process and vesting title of the solvent corporate property in those receivers; and whether at all the entire record shows any facts upon which the Court could act were the court's actions clothed with due process, under the statute.

STATUTE INVOLVED.

The Statute involved is the statute of the State of Pennsylvania known as the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Pennsylvania Statutes, Section 2852-1107, as amended, and set forth in Appendix p. 19, hereto.

STATEMENT.

On October 24, 1956, a petitioner, one, Robinson, filed a petition in the Common Pleas Court of Philadelphia averring that he and his wife owned 100 shares of common stock of the Self Drive It Corporation being fifty percent of the total issued capital stock and that the remaining fifty percent of the stock was owned by M. Alexander Forman and his wife, Betty Forman, the appellants here. Robinson's wife did not join in the petition. Hence, it is the petition of the owner of forty nine and one half percent of the stock. The petition averred that the directors of the corporation were deadlocked in the management of the corporate affairs; the shareholders were unable to break the deadlock and irreparable damage was being suffered by the corporation (p. 8a of the Record below).* These averments were a paraphrase of the Business Corporation Law, as quoted in Appendix p. 19, hereto. The petition further averred that the actions of the officers, directors and shareholders prevented the corporation from properly functioning and that certain officers had refused and continued to refuse to carry out their duties, particularly to sign checks with which to

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* The Supreme Court of Pennsylvania, has certified a copy of the record as printed on the appeal to that court. The pagings herein refer to the pages of that printed record as certified to this court.

pay employees and to meet obligations of the corporation. That there was danger of mis-application of funds and that there had been mis-application of funds (p. 9a, Record below). These latter averments were not under the "Statute Involved". The petition prayed that a receiver be appointed to take possession subject to further order of the Court. The petition was sworn to. There were no accompanying affidavits in support of the averments of the petition. The petition was presented to a judge of the Common Pleas Court of Philadelphia in chambers, who immediately allowed the petition and appointed temporary receivers of all of the assets and property of the corporation and empowered the receivers to operate the business, to borrow $75,000. if necessary, to file report with the Court (p. 6a, Record below) and directed they were to operate the business for sixty days when the Court should fix a date for hearing and after a full hearing thereon make determination upon the appointment of a *permanent* receiver (p. 7a, Record below).

That initial proceeding on which the entire case depends, was in chambers without notice to Forman and his wife or to the corporation. The receivers immediately took over all property. They were in possession before the Formans or the corporation had notice. They filed a report on November 15, 1956, which showed the corporation to be solvent and to have earned approximately $26,000. in the first nine months of 1956, before taxes (P11a and P12a of the Record below as certified). The Common Pleas judge in an opinion (p. 46a, Record below) said the corporation being solvent and no fraud being claimed, the only remedy petitioner had was under the statute, i. e. the Business Corporation Law, 15 P. S. 2852-1107. Thereafter, a petition was filed on November 15, 1956, which (p. 13a, Record below) was heard and the Record of that hearing is entitled "Hearing on Petition for Appointment of Liquidating Receiver". Testimony was taken and the matter was continued at request of Forman's counsel until November 28, 1956 (p. 35a, Record below) where the hearing Judge said that this was a continued hearing to have a *permanent* receiver appointed

and counsel for the Formans said that he and his clients had been led to agree and to say to the Court they should do nothing further (meaning at the hearing), but agree to the Court appointing a permanent receiver *"and move on from that point."* Counsel for the petitioners who was now counsel for the receivers also, then stated they were seeking the appointment of a liquidating receiver (p. 35a, Record below), and the Court forthwith appointed a liquidating receiver.

Thereafter on December 7, 1956, a motion under Rule 251(c) of the Common Pleas Court was filed on behalf of the Formans asking the Court to quash, set aside and dismiss the proceeding and assigned inter alia:

> "(1) The said petition was filed with the Court under the provisions of the Business Corporation Law of Pennsylvania (Act of May 5, 1933, P. S. 364, 15 P. S. 2852-1107-1112), the orders, decrees and actions of the Court were predicated upon the said petition; and the said Act, i. e. the Business Corporation Law of Pennsylvania, 15 P. S. 2852-1107 to 1112 are unconstitutional since the said Act violates the Fourteenth Amendment of the Constitution of the United States providing inter alia: '* * * nor shall any state deprive any person of life, liberty or property, without due process of law; * * *'
>
> being U. S. Code Annotated, Constitution, Amendment Fourteen, Page 69." (pp. 36a-37a, Record below.)

In an opinion dated December 19, 1956, the Common Pleas Court dismissed the motion to quash (p. 44a to p. 50a, Record below). It held that inasmuch as the corporation was entirely solvent and no rights of creditors were involved the action was under the Pennsylvania Business Corporation Law of 1933, 15 P. S. 2852-1107 to 1108. Appendix p. 19. It further held that each step of the proceedings had been taken in strict accordance with the Pennsylvania Business Corporation Law of 1933 and that there was no merit in the

motion to quash, set aside and dismiss the proceedings (p. 49a, Record below). It did not discuss or specifically decide the constitutional question raised by the exception numbered 1 (quoted above) but dismissed the exception No. 1 by the general order that the motion was without merit, because as the court said, the petitioners and their counsel had appeared and had consented to the appointing of a liquidating receiver in course of contesting the constitutionality of the receivership.

The Formans filed appeal to the Supreme Court of Pennsylvania as of January Term 1957, No. 193 and in that appeal assigned the refusal of the Common Pleas Court to hold that the appointment of the temporary receivers for the solvent corporation upon an ex parte petition without notice and without opportunity to be heard, whereby shareholders were divested of their property and business, was unconstitutional and void because it was without the due process required under the Fourteenth Amendment of the United States Constitution. The question was considered by the Supreme Court of Pennsylvania as shown by its decision in 390 Pa. 161, 134 A. 2d 662, p. 666, Appendix P. 24, where it said "On this appeal appellants argue * * * (2) that the Court below appointed a receiver without an opportunity being afforded to answer the petition before the receiver took over, that the Court never made findings of fact or law as such and that the entire proceedings lacked due process, and are consequently void."

The Supreme Court then said that, because counsel for stockholders, the Formans, appeared at the "Hearing on the Appointment of a Liquidating Receiver" for the corporation; conducted partial hearing on that petition; asked for and was granted a continuance and at the continued hearing said to the Common Pleas judge—"events after that (the prior hearing) had led me and my clients (i. e. the Formans, not the corporation) to agree and say to the Court that we should do nothing further but agree to the Court appointing a *permanent* receiver *and move on from that point*" that this was in effect agreement to the receivership.

The next words, in the record after the words "that point," were the following colloquy had by counsel for Robinson and now counsel for the receivers, also, and the Court (p. 35a, Record below):

> "MR. MILLER: If it pleases your Honor, although the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.
>
> THE COURT: Oh, I see. That is the correct term, is it, 'liquidating receiver', rather than 'permanent receiver'?"

The Supreme Court said these actions and words constituted a failure by counsel for the Formans to offer any objection to what was being said or done and that the Formans, i. e. stockholders, thereby consented to the appointment of an incorrectly described "permanent" but really a "liquidating" receiver for the corporation, not for the Formans, and that "appellants did not object or, in fact, say anything at all which would have the effect of qualifying their consent." This despite the fact that counsel had said in the same sentence and breath—"*and move on from that point.*—"

The Supreme Court spoke thus of the second and interim petition, and not of the original petition for temporary receivers which is attacked as unconstitutional and without due process. Therefore, the Supreme Court of Pennsylvania has held that counsel for shareholders, the petitioners, here did not oppose the appointment of a permanent receiver (corrected to liquidating receiver) for the solvent corporation; that this was failure to contest the appointment of a liquidating receiver for the solvent corporation; and that this failure made valid the prior void appointment of temporary receivers for the solvent corporation which began the proceeding. That is, the defect of unconstitutionality was cured because counsel for the petitioners, not for the corporation, here allegedly "consented" to the appoint-

ment of a "permanent" receiver. Counsel for stockholders said that he would not "further" do anything at that hearing, but agree to the appointment of a "permanent receiver". But counsel also said "*—and move on from that point*" (p. 35a, Record below). This statement, the Supreme Court and the Common Pleas Court have completely ignored.

That hearing was on November 28, 1956 (p. 34a, Record below). On December 7, 1956, or nine days thereafter, counsel for the Formans did—"*move on from that point*" by filing a petition to quash, set aside and dismiss the above proceeding (pp. 36a-37a, Record below) and assigned that "the orders and actions of the Court predicated upon the said petition and the said act—are unconstitutional since the said act violates the Fourteenth Amendment of the Constitution of the United States providing inter alia "nor shall any State deprive any person of life, liberty or property without due process of law; * * *".

There had been no opportunity to interpose this defense when the petition was filed and allowed in chambers and the receiver was appointed without notice or opportunity to be heard, and the Court, in chambers gave the corporate property to receivers.

The constitutional question could be raised only by a motion to dismiss assigning that the proceeding was unconstitutional, and after the property had been taken.

It was raised at the earliest possible moment by stockholders after it was stated to the Court that the Court would not be opposed in appointing a *permanent* (?) receiver and the stockholder-petitioners would "*—move on from that point—*".

The appointment of the liquidating receiver for the solvent going corporation with instructions to liquidate the business and sell the property was an order following the original appointment of temporary receivers without due process. This original order being void, the subsequent order is sought to be declared as void and of non-effect, and

as not validating and making lawful the unconstitutional act and actions, wherein the temporary receivers were appointed for the solvent going corporation.

Within nine days, seven business days, after a liquidating receiver was appointed, the motion to quash was filed because the proceeding was instituted without due process. It was a point and question on the subsequent appeal to the Supreme Court of Pennsylvania, and was decided by the Supreme Court as indicated above.

The constitutional question has been carefully raised, dismissed and preserved for the purpose of this appeal.

THE QUESTIONS ARE SUBSTANTIAL.

The issues involved in this case are substantial for the reasons set forth in the following numbered paragraphs.

1. The decision of the Court below (Supreme Court of Pennsylvania) in the instant case is directly in conflict with the decision of the Third Circuit Court of Appeals in the case of *Nottebaum vs. Leckie*, 31 F. 2d 556. Both courts have appellate jurisdiction in Pennsylvania, in their respective spheres of judicial authority. Their decisions are final, the one in the Federal system; the other in the State system.

The case of *Nottebaum vs. Leckie*, 31 F. 2d 556, arose in the State of New Jersey under its General Corporation Act [2 Comp. St. N. J. 1910, pp. 1640, 1644 Sections 65, 66], and there the treasurer of the corporation,—

> "* * * filed a bill of complaint in equity against the Noxon Chemical Products Co., Inc., alleging among other things that the plant had ceased all operations, that there was no money available for carrying on the work of the plant, that the company was insolvent, and asking for the appointment of a receiver." 31 F. 2d 556, p. 558.

It is to be noted insolvency was there alleged. This action was instituted in the United States District Court for the District of New Jersey, at Newark and:—

> "Although no notice of any kind of the filing of the bill was given to the company or alleged to have been given—nor were any specific facts shown by affidavit, or by verified bill, which could legally dispense with such notice, the Court, nevertheless, appointed—receivers of the said corporation until further order of the Court, together with all the properties of the defendant and of every description, real and personal; the defendant and all persons acting under it being directed to deliver to the receivers any and all of its properties—. The receivers were further authorized to take complete control of defendant's property wherever found—with all the powers of receivers in cases of that kind, and to make report of their proceedings to the Court."

The decree also contained a broad form injunction staying all actions against the corporation by any person. 31 F. 2d 556, p. 558.

> "The defendant had no notice or knowledge of these proceedings until the receivers armed with the Court's decree, appeared on the premises, ousted the defendant therefrom, and took full possession of its property, assets, and business. 31 F. 2d 556, P. 559.
>
> "What, then, is the legal situation? On the presentation of the bill and affidavit, the court passed summarily on the case so presented, and finding the facts there asserted to be true, appointed receivers, which immediately and of itself, divested the defendant of all its property. This was a final decree." 31 F. 2d 556, p. 559.
>
> * * * * * * * *
>
> "The receivers were appointed, as shown by the decree, until further order of the court. This is the situ-

ation as to all receivers. They are merely the arm of the court, and subject to the court's orders. In this final decree the proceeding as a suit inter partes, was at an end." 31 F. 2d 556, p. 560.

* * * * * * * * *

"The federal courts have not been less emphatic in their condemnation of proceedings instituted without notice to a party to defend. In Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. at page 193, 35 S. Ct. 580 (59 L. Ed. 910) Mr. Chief Justice White said: 'That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement.' And at page 194 (35 S. Ct. 580): 'And that a corporation no more than an individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles, of due process as recognized in Pennoyer v. Neff (95 U. S. 714, 24 L. Ed. 565), is also established by the cases referred to and many others. * * * Whenever a provision of the Constitution is applicable the duty to enforce it is imperative and all-embracing and no act which it forbids may therefore be permitted.' This is only a general statement of the well-settled principle of law." 31 F. 2d 556, p. 560.

* * * * * * * * *

"We stop to inquire, therefore, what subsequent act of the defendant has validated this unlawful procedure? What subsequent act of the defendant has breathed into the dead body the breath of life? By what legal alchemy has this transmutation been wrought? Does some vain attempt to undo the wrong so couple it with the proceeding as to make lawful that which before was wholly unlawful? Because some creditor or stockholder attempted, in obedience to the court's direction, to show cause why an illegal decree should not stand, does the denial of his right clothe such decree with the vesture of legality? Does the Court's assumption to do

what was forbidden by the Constitution and law of the land become a lawful exercise of power by reason of some act of commission or omission on the part of a creditor or stockholder? Most certainly not." 31 F. 2d 556, p. 561.

"On November 9, 1926, Ralph Nottebaum, Sr., holder of a majority of the common stock, and Rudolph Nottebaum, a creditor, presented a petition, which was joined in by a majority in number and interest of the unsecured creditors, charging conspiracy to secure control of the company, both before and after the receivership, falsehoods in the bill of complaint, machinations to bring about a condition of insolvency, false and fraudulent inventory and appraisement, and other matters." 31 F. 2d 556, P. 561.

* * * * * * * * *

"To briefly recapitulate:

1. The appointment of the receivers without notice or an opportunity to be heard, and the resulting divestiture of defendant's property and business, was a taking of their property without due process of law, and therefore illegal and void from the beginning.

2. The order of February 25th, appointing the receivers and granting an injunction against the defendant, was a final decree, in which the suit between the parties was at an end. The decree not only divested the defendant of its property, but, by denying to the company the power to exercise its franchises, created a trust for the administration of its property under the supervision of the court.

3. By the order of August 6th, the power of the receivers was simply continued. The status and rights of the defendant company, under the order of February 25th, were in no manner altered or affected by the order of August 6th." 31 F. 2d 556, P. 562.

In this case now before this Court the Supreme Court of Pennsylvania has held that the appointment of temporary

receivers for a solvent going corporation without notice or opportunity to be heard and the taking of the property of the solvent corporation was not without due process and that it was a constitutional taking of the property, because counsel in a subsequent interim proceeding withdrew opposition to an interim action of the Court, and said the matter would be "—move(d) on from that point—."

The Court held (in effect) this was agreement and consent which validated the prior void, unconstitutional, unlawful act of the court in appointing temporary receivers without notice and opportunity to be heard.

The conflict in the decisions of these Courts, the one controlling in the federal jurisdiction and the other in the State jurisdiction, in the same State upon the same constitutional question, logically ought to be resolved by this Honorable Court.

2. The action of the Court in appointing temporary receivers of a solvent corporation without notice and opportunity to be heard being a void act because unconstitutional all other actions of the Common Pleas Court subsequent thereto in appointing liquidating receiver and ordering the sale of the assets inter alia, were null and void and of no effect, no matter what action or consent might transpire at any subsequent interim step in the further handling of the void suit.

> "An unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. County of Shelby*, 118 U. S. 425, 6 Supreme Court Reporter (West. Pub. Co.) 1121, p. 1125.
>
> "Wherever a provision of the Constitution is applicable the duty to enforce it is imperative and all embracing and no act which it forbids may therefore be permitted." *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, p. 196, 35 S. Ct. 579, p. 581.

3. Notice and an opportunity to be heard are the basic essentials of due process and where notice and an opportunity to be heard are lacking there is an unconstitutional denial of due process. And process lacking these essentials is void.

"Notice of suit and opportunity for hearing are requisites of due process."

This phrase is taken from 17 Fed. Digest of West Reporter System, Constitutional Law under Key No. 309 (1) on P. 721. Following it there are cited many cases in this Court and in other Federal Courts too numerous and not desirable or necessary to be cited in this jurisdictional statement. One of the last decisions of this Court which is there cited concerns the revocation of a doctor's license to practice, *Missouri Ex Rel Hurwitz vs. North*, 46 S. Ct. 384, P. 385, 271 U. S. 40: "Its (due process) requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard, and to present his claims or defense."

The rule has been applied in many and varying circumstances. And is so well known that further citation of authority and cases is but briefly made in this statement.

The following cases are authority for the proposition that the first of the procedural formalities required by due process of law is notice:

Crane v. Hahlo, 258 U. S. 142, 42 S. Ct. Rep. 213 (eminent domain).

Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. Rep. 921 (assessment).

Central of Georgia Ry. vs. Wright, 207 U. S. 127, 28 S. Ct. Rep. 47 (assessment and valuation).

Chicago etc. Ry. vs. Minnesota, 134 U. S. 418, 10 S. Ct. Rep. 702 (determination of rates for public utilities). Concurring opinion of Justice Miller.

The second essential is an opportunity to be heard:

Riverside etc. Cotton Mills vs. Menefee, 237 U. S. 189, 35 S. Ct. 579;
Willis on Constitutional Law, 1936 Edition, pp. 664 and 665.

The Supreme Court of Pennsylvania has said:

"The fundamental requirements of due process in a proceeding affecting property rights are a notice which is an adequate safeguard to the rights of the parties and an opportunity to be heard."
Ex Rel Chidsey vs. Keystone Casualty Co., 373 Pa. 105 (Certiorari denied 74 U. S. Supreme Court 79).

4. The question is a general one and of importance to all corporations since it may be sought to have a receiver appointed for any solvent going corporation. If a solvent going corporation may be put into receivership upon the ex parte petition of a minority stockholder or of a stockholder owning fifty percent of the stock of the corporation without notice and an opportunity to be heard, and in an in chambers allowance, it must be apparent, without argument and upon its mere assertion, that such proceeding endangers the uninterrupted existence of every corporation. It is a drastic and fearsome statute and rule that any solvent going corporation may be placed in receivership and its property turned over to a receiver upon the ex parte unsupported petition of any stockholder, particularly a minority stockholder, without notice of the petition and without an opportunity to be heard.

5. The principle that litigants appearing in Court to contest an unconstitutional and void decree by something done or said by the said litigants or their counsel in course of handling, protesting and contesting the unconstitutional procedure may validate the unconstitutional act which was

void from the beginning, and make the unconstitutional act or action of the court a lawful valid exercise of the court's powers, is the assertion of a rule that the constitutional safeguards may be set aside by individuals, merely by contesting, protesting and defending against the unconstitutional acts, and thus make valid that which is void and invalid, under the constitution.

Such a rule and proposition is in the face of the opinion of this Court in *Norton v. Shelby*, 6 U. S. S. Ct. 1121, p. 1125.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The clearest court pronouncement on this proposition is that quoted above from *Nottebaum vs. Leckie*, 31 F. 2d 556, P. 561:

> "Does the court's assumption to do what was forbidden by the Constitution and law of the land become a lawful exercise of power by reason of some act of commission or omission on the part of a creditor or stockholder? Most certainly not."

Hence, this Honorable Court is asked to review the holding of the Supreme Court of Pennsylvania which is to the effect that an act and a proceeding thereunder void from the beginning may be validated and made lawful because in the course of a subsequent interim hearing counsel for litigants did not oppose some subsequent interim action of the Court but stated they would agree to the court carrying out its announced interim intent—"and move on from that point—" and thereafter moving to quash the entire proceeding, because it is unconstitutional.

The implication is that anyone may start a void unconstitutional proceeding and that by collusion or otherwise some subsequent act of a contestant can make that which

was void and unconstitutional from the beginning valid and lawful by such subsequent act of counsel or party. There is no end to the possibilities that would exist for defeating constitutional safeguards if that be the law of the land.

CONCLUSION.

For the foregoing reasons, this appeal should be heard and the constitutional question determined.

Respectfully submitted,

THOMSON F. EDWARDS,
J. WEBSTER JONES.

APPENDIX A—STATUTES.

Pennsylvania Statute Relating to Corporations.

15 Purdon's Pennsylvania Statutes §2852 et seq.

"§2852-1. Short title

Be it enacted, &c., That this act shall be known, and may be cited, as the 'Business Corporation Law.' (1933, May 5, P. L. 364, art. I, §1.)"

* * * * * * * * *

"§2852-1107. Involuntary proceedings for winding up and dissolution.

A. The several courts of common pleas of the Commonwealth may, upon petition filed by a shareholder of a business corporation, entertain proceedings for the involuntary winding up and dissolution of the corporation, when it is made to appear:

* * * * * * * * *

(4) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof.

* * * * * * * * *

C. Any petition for the involuntary winding up and dissolution of a corporation, authorized to be filed under this section, shall be filed with a court of common pleas of the county in which the registered office of the corporation is located. (1933, May 5, P. L. 364, art. XI, §1107.)".

APPENDIX B—OPINIONS AND JUDGMENT BELOW.

This appeal was taken from an order of the Court of Common Pleas No. 1 of Philadelphia County, dated December 19, 1956, dismissing appellant's motion to quash, set aside and dismiss all proceedings in the matter in controversy up to the date of the motion.

Self Drive It Corporation is a "closed" Pennsylvana corporation the capital stock of which is owned entirely by two married couples who also serve as its only four directors. Appellants, M. Alexander Forman and Betty Forman own —respectively—49% and 1% of the capital stock; appellees, Richard S. Robinson and Florence H. Robinson, own—in the same proportion—the other half of the corporate stock. The control of the corporation is thus divided evenly between the two families.

On October 26, 1956, appellee Richard S. Robinson petitioned the Court of Common Pleas No. 1 of Philadelphia County under §1107 (A) (4) of the Pennsylvania Business Corporation Law of 1933, as amended, for the appointment of a receiver "to liquidate the assets and wind up the business of the corporation in the nature of a "dissolution." The petition contained an allegation, couched in the language of §1107 (A) (4) of the statute, supra, that the directors were deadlocked in the management of the corporate affairs, that the stockholders were unable to break this deadlock, that irreparable damage and injury were being suffered by the corporation, and such damage and injury would continue and be of such a character and nature as to destroy the stockholders' equity and be injurious to the creditors.

On the same day the court below, pursuant to §1108 (A) of the Business Corporation Law, supra, 15 P. S. §2852-1108 (A) appointed one Irwin Apfel and one David Cohen as *temporary* co-receivers of the corporation, specifically stating that the court would fix a date for the full hearing on the petition and facts at which time it would determine

whether, and for what purposes, a *permanent* receiver should be appointed.

The temporary co-receivers were ordered to file an inventory and appraisement of the assets and property of the corporation and to make a report to the court thereon within 30 days. Pursuant to this order, on November 15, 1956, an exhaustive and comprehensive report was filed in which the temporary co-receivers reviewed the nature, history and problems of the business and concluded with the recommendation, buttressed with full reasons therefor, that a liquidating receiver should be appointed whose primary duty should be to liquidate the corporate assets.

On the same day the court below ordered that a hearing be held for the purpose of determining whether or not a "*liquidating*" receiver should be appointed. At this hearing, on November 21, 1956, appellee Robinson introduced testimony: (1) that neither the Robinsons nor the Formans were able to control the corporation because each family owned 50% of the stock; (2) that there had been a serious dispute existent for several months between Richard S. Robinson and M. Alexander Forman which had arisen because of Mr. Forman's insistence that the corporation's fleet of motor vehicles should be reduced; (3) that as a result of this dispute Mr. Forman, who served as secretary-treasurer of the corporation, on one occasion had refused to sign the payroll checks of the corporation and that this unexplained refusal had resulted in the employees being unpaid at the proper time, thereby revealing to them the dissension existent in the management and affecting their morale; (4) that on another occasion Mr. Forman had refused to sign a check for approximately $29,000. (payable to the bank on which the corporation depended for its financing) on the date when the payment became due and that he persisted in this refusal until Mr. Robinson was forced to reveal to the bank the dispute within the corporation's management and the inability of the stockholders (who comprise the entire management) to resolve this dispute.

At the hearing appellants' counsel cross-examined ap-

pellee Robinson and his witnesses but failed to offer any evidence at all to rebut their testimony. At appellants' request and over appellees' objection the hearing was continued until November 28, 1956, so that appellants could further prepare and review their case.

When the continued hearing was resumed the following colloquy—the importance of which is self-evident—occurred:

> "The Court: This is a hearing, a continued hearing, is it not, on a petition to have a permanent receiver appointed?
>
> "Mr. Miller: (counsel for the temporary receivers) Yes, Sir.
>
> "Mr. Jones: (counsel for the appellants) That is right. At the last hearing I made representation to the Court that I desired to file certain exceptions. *Events after that—since then we have had two business days, Friday and Monday—Events after that had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a permanent receiver and move on from that point,* your Honor. (Emphasis supplied.)
>
> "Mr. Miller: If it pleases the Court, although the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, sections 1107 and 1108.
>
> "The Court: Oh, I see. That is the correct term, is it, 'liquidating receiver', rather than 'permanent receiver'?
>
> "Mr. Miller: That is right. * * *."

It must be noted, parenthetically, that nowhere during the course of this discussion did appellants offer any objection whatsoever to what was being said or being done. The record could not possibly be any more clear on this point. Appellants consented to the appointment of what their counsel incorrectly described as a "permanent" receiver.

Appellees immediately corrected this mistake, asserting that the correct term was "liquidating receiver" and the Court took immediate cognizance of the correction. *Appellants did not object or, in fact, say anything at all which would have the effect of qualifying their consent.* It can only be assumed, from the face of the record, that appellants consented to the appointment of a liquidating receiver.

This conclusion becomes even more inescapable in view of what was said shortly thereafter, at the conclusion of the hearing:

> "The Court: I will appoint Mr. Apfel as liquidating receiver. As you know, the Court may appoint a receiver on its own motion and eliminate one suggested by the original petitioner. This is no reflection whatsoever on Mr. Cohen, for whom I have high regard. It is just that at this point there is no necessity for two receivers and we want to keep the expense down.
>
> "Mr. Miller: I appreciate that.
>
> "The Court: I see that Mr. Cohen is in Court and I know that he will understand exactly what I am stating, that this is in no sense any criticism of him or any reflection on him. Mr. Irwin Apfel is appointed sole liquidating receiver. The bond heretofore required may be continued until further order of the Court. There is no use increasing the amount of the bond unless the necessities of the situation require it.
>
> "Mr. Miller: Very good, sir.
>
> "The Court: Whatever is to be done is to be done with the knowledge of all the parties concerned and nothing will be approved by the Court without ample notice and hearing. I hope that the parties will find a way of getting the very most they possibly can from this very profitable business."

Again, appellants neither objected nor gave any indication whatever that they intended to qualify their consent to the appointment of a receiver. It should be noted, however,

that they did not even attempt to present the case which they had stated, on November 21, 1956, that they needed additional time to prepare. The conclusion is unavoidable in view of this record that appellants' claim they consented only to the appointment of a permanent, and not a liquidating receiver, is untenable.

The order of November 15, 1956, fixing the hearing could not have been any more specific as to the purpose of that hearing ("* * * to determine whether a *liquidating* receiver should be appointed in the above matter") (Emphasis supplied), and again, appellants stood mute while a complete explanation and distinction was drawn between "liquidating" and "permanent" receivers in open court. Under these circumstances we have no alternative but to hold that at the continued hearing which occurred on November 28, 1956, appellants consented to the appointment of a liquidating receiver for the corporation.

Thereafter, on December 4, 1956, the liquidating receiver petitioned for leave to sell the corporate assets. On December 5, 1956, the court below ordered the liquidating receiver to sell the corporate assets in open court to the highest bidder on December 19, 1956. On December 7, 1956, the appellants filed a motion to quash, dismiss and set aside the proceedings which motion the court below denied by a written opinion and order dated December 19, 1956. Appellants thereupon took this appeal.

The sale ordered by the Court was continued twice *at appellants' request*, but finally, on January 8, 1957, the assets of the corporation were sold to the highest bidder.

On this appeal appellants argue: (1) that there was insufficient evidence to support the averments of the petition that there was a deadlock in the management and that the corporation was suffering irreparable injury; (2) that the court below appointed a receiver without an opportunity being afforded to answer the petition before the receiver took over, and the Court never made findings of fact or law as such, and that the entire proceedings lacked due process and are consequently void; (3) that the court below lost all

further jurisdiction when the appeal was taken and certiorari lodged in that court.

[1, 2]. We deem it wholly unnecessary to consider the merits of the appellants' first two assumptions in view of the fact that they, as has been explained, expressly consented to the appointment of the liquidating receiver. Having once given such consent in open court, thereby foreclosing the need for any further testimony to show the deadlock and irreparable injury, appellants will not now be heard to deny the necessity for the receivers' appointment. Nor can appellants be heard to assert that they were denied due process of law when, in a hearing held for the express purpose of affording due process, they consented to the appointment of the receiver and thus, impliedly if not expressly, admitted the *necessity for* such an appointment.

There have been few cases decided under the provisions of the Pennsylvania Business Corporation Law of 1933, supra, herein question. However, in a situation such as the instant case, the express terms of the statute make little difference. The appellants, by their consent and acquiescence to the appointment of the receiver, induced the court below to take the action of which they now complain and should be foreclosed from complaining about the order of the court. Cf: In re Sherwood's Estate, 206 Pa. 465, 56 A. 20; Bergman v. Straus, 264 Pa. 439, 107 A. 810; Gough v. Halperin, 306 Pa. 230, 159 A. 447; Thomas v. Hartt, 136 Pa. Super. 84, 7 A. 2d 30.

[3] Appellants argue that by taking an appeal to this Court and causing a certiorari to be issued to the court below they effected what amounts to a supersedeas and removed all jurisdiction from the court below in the matter in litigation pending determination of the appeal.

It would be well to emphasize at this point that appellants never were denied a supersedeas—throughout the entire course of the proceedings subsequent to the filing of their appeal they never requested one. In fact, the record

clearly shows that between the filing of the appeal, on December 19, 1956, and the sale of the assets of the corporation on January 8, 1957, appellants took an active part in all the proceedings in the court below to the extent of requesting and receiving two continuances and actually bidding at the sale. Furthermore, during the course of the proceedings they were specifically advised by the court below that an appeal did not ipso facto act as a supersedeas.

Appellants rely, for authority in support of their position, upon Harwood v. Bruhn, 313 Pa. 337, at page 341, 170 A. 144, 145. In that case, this court quoted as follows from Gilbert v. Lebanon Valley Street Railway Company, 303 Pa. 213, 218, 154 A. 302:

> "'At common law a court of first instance is without jurisdiction to proceed with a cause after the record has been removed to an appellate court. This rule still applies in the absence of a statute providing otherwise.'"

As pointed out by the lower court, the facts of the Harwood case are very different from those involved in the instant appeal. The appeal in that case was taken from the lower court's order striking off plaintiff's judgment against defendant. It is obvious that no bond need be filed in order to effect a supersedeas in such a situation because there is no party in need of the protection afforded by such a bond. The instant case, however, presents a situation in which the appellees, as stockholders entitled to share in the distribution of the proceeds from the sale of the corporate assets, could easily be injured by a change in the value of the corporation's assets during the period of delay necessitated by a stay of the proceedings.

The lower court correctly distinguished the Harwood case, as it applies to the instant situation, as follows:

> "If, on the contrary, in that case the lower court had refused to stroke off the judgment, or refused to open the judgment, or refused to stay execution (in a situa-

tion where the judgment was properly entered but not yet collectible), and it was the defendant who would have appealed, then it is clear that under applicable statutes the mere taking of an appeal by him would not have stayed the plaintiff's proceedings in the court below, but the defendant would have had to obtain a supersedeas and file a bond. * * *.

"In Shinn v. Stemler, 159 Pa. Super. 129, at page 130 [47 A. 2d 294], which was an appeal by defendant from an order of the court making a rule absolute for citation for the possessior of real estate, the court said: 'The question presented is whether that appeal nevertheless acted as a supersedeas. It did not. The Act of May 19, 1897, P. L. 67, as amended, 12 P. S. §1133 et seq., rules appeals on the question of supersedeas; and a supersedeas operates only in favor of those who ask for and have done those things necessary to obtain it.' Drabant v. Cure, 280 Pa. 181, 187, 124 A. 340; Koenig v. Curran's Restaurant & Baking Co., 121 Pa. Super. 201, 205, 207, 183 A. 451."

We fully approve the reasoning of the court below. In a situation such as this, where a stay could cause irreparable damage to the value of this corporation which has already suffered loss of borrowing power and business prestige because of this bitter dispute, we cannot hold that appellants were entitled to a supersedeas, especially since they neither requested one nor did those things necessary to obtain one. Act of May 19, 1897, P. L. 67, §12, as amended, 12 P. S. §1149. Especially is this true where, as here, the court ordered the sale prior to the appeal, the appellant had consented to the court's action and consequently had no basis for appeal and the appellants participated fully in all proceedings subsequent to the present appeal to the extent of securing continuances and bidding at the sale.

Appeal dismissed.

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IN THE

Supreme Court of the United States

October Term, 1957.
No. 726.

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*,

vs.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder,
Appellee.

BRIEF OF APPELLANTS OPPOSING APPELLEES' ALTERNATIVE MOTION UNDER RULE 16, TO DISMISS OR AFFIRM.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OPPOSING APPELLEES' ALTERNATIVE MOTION UNDER RULE 16, TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

The Appellants file this Brief under Rule 16(3) of this Court opposing the Appellees' motion for the reasons set forth herein. For brevity the said motion is hereafter referred to as the Motion To Dismiss.

The Appellants' appeal raised the constitutional question that the appointment of the original receivers upon an unsupported, ex parte petition, allowed in chambers without notice or opportunity to be heard was without due process.

The Appellees' Motion To Dismiss alleges that there was due process in appointing the temporary co-receivers for the solvent going corporation upon petition of a minority stockholder. The Motion To Dismiss also alleges that a shareholder consented to the appointment of a liquidating receiver at a hearing which they assert was held to afford the due process necessary to the constitutional appointment of the original, i. e. the first temporary co-receivers and that this alleged consent of a mere stockholder validated the unconstitutional appointment of receivers, and was binding on the corporation.

This hearing, including its continued hearing, was the only hearing at which evidence was received on any subject or for any purpose. It was not held until twenty-eight days after the original co-receivers were appointed without notice or opportunity to be heard, ex parte, in chambers, upon unsupported petition of a stockholder of forty-nine and one-half (49½) percent of the shares, and the receivers after being in possession twenty-three days filed report recommending a liquidating receiver be appointed.

This brief of the Appellants in reply to the Motion To Dismiss, etc., shows:

(a) There was no due process since the original order appointing receivers was in chambers, without notice or opportunity to be heard.

(b) There was never any hearing on the original petition.

(c) The only hearing was upon recommendation of the original receivers made twenty-three days after they were appointed by an unconstitutional procedure, and the hearing was twenty-eight days after their appointment.

(d) There was no consent to the appointment of a liquidating receiver.

(e) A stockholder cannot bind the corporation even had he consented to appointment of a receiver for the solvent corporation.

(f) The appeal from the appointment of receivers for a solvent going corporation without due process should be heard and the constitutional question raised by this appeal should be decided and the judgment of the Supreme Court of Pennsylvania should be reversed and this Motion To Dismiss should be denied.

The Appellants first show that the Statement of Facts made in Appellees' Motion to dismiss does not contain all the facts and is inaccurate in certain respects.

In Paragraph 2, page 2, of the Motion To Dismiss, the Appellees have failed to inform the Court that the Petition filed by Richard S. Robinson, the petitioning stockholder:

(a) was sworn to by him but contained no supporting affidavits (Record pp. 8a-9a).

(b) that the petition was presented to a Common Pleas judge in chambers, who forthwith allowed the petition, appointed receivers for the solvent going corporation with "authority to operate the business of Self Drive It Corporation, for a period of sixty days, subject to further order of the Court. That the Court *shall . . . fix* a date for hearing . . . and *at such time . . .* make its determination upon the appointment of a *permanent* receiver as the Court may *thereupon* determine" (pp. 8a-9a).

(c) that the corporation was a solvent going corporation and the report of the receivers so showed the Court (pp. 11a-12a). Its assets eventually were bought for $673,000 (Appellees' Motion To Dismiss, paragraph 12, page 5). It had earned $26,000 before taxes in 1956 (pp. 11a-12a).

(d) that the Appellants, the stockholders owning fifty percent of the stock of the solvent going corporation had no notice or opportunity to be heard, nor did the solvent going corporation, as such, but the receivers immediately took possession of the corporate assets.

(e) the receivers were "authorized to borrow" up to $75,000 to continue to operate the going business (p. 6a) until the Court could ". . . make its determination upon the appointment of a *permanent* receiver . . ." (p. 7a). The future determination was not to be a "liquidating receiver".

(f) under the statute here attacked, i. e., the Business Corporation Law of Pennsylvania, 15 Purdon Statutes 2852, there cannot be a "permanent receiver". Under that Act, there can be only a petition for "winding up and dissolution of the corporation". See Act quoted in Appendix to "Jurisdictional Statement" p. 19 thereof.

(g) that the Court appointing the original receivers and later holding the hearing on the recommendation of the original receivers, considered the proceeding one for a *permanent* receiver until (p. 35a) at the last minute before appointing the liquidating receiver:

"THE COURT: This is a hearing, a continued hearing, *is it not*, on a petition to have a *permanent* receiver appointed?

MR. MILLER: Yes, sir.

MR. JONES: That is right . . .

MR. MILLER: If it pleases your Honor, *although* the term '*permanent* receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act of 1933, Sections 1107 and 1108."

(h) the prayer of the ex parte petition asked only the appointment of a "receiver" (p. 10a) without specifying whether he should be a permanent or liquidating receiver (p. 10a) and the petition did not say it was under the Business Corporation Act. The first time any designa-

tion of the kind of a receiver was made was as quoted immediately above, and the judge, petitioners' counsel and appellants' counsel were considering a "permanent receiver" until petitioners' counsel said as above that "although the term 'permanent receiver' is used, we speak of a 'liquidating receiver' within the purview of the Business Corporation Act . . ." Therefore, for the first time on November 28, 1956, more than a month after the original receivers were appointed ex parte, it was stated a liquidating receiver was being "spoken of" (p. 33a).

(i) that counsel for the appellants did not consent to the appointment of a liquidating receiver, but said (p. 35a) . . . "events . . . had led me and my client to agree and say . . . that we should do nothing further but agree to the court appointing a permanent receiver and move on from that point" . . .

(j) that thereafter motion was filed to quash the entire proceeding as unconstitutional.

ARGUMENT.

(1) THERE WAS NO DUE PROCESS.

There was no due process because there was no notice of the petition for appointment of temporary receivers and no opportunity to be heard thereon.

The appeal here is upon the constitutionality of the original appointment of temporary receivers for the solvent going corporation, upon an ex parte, unsupported petition in chambers, without notice or opportunity to be heard and contends this was and is a denial of due process under the Constitution of this United States, the Fourteenth Amendment thereto.

As set forth in the Jurisdictional Statement (inter alia

p. 14) the appointment of the receivers of the solvent going corporation, without notice and opportunity to be heard was, and is, null and void, since the unconstitutional act is not a law; conferred no right; imposed no duty; afforded no protection; and is in legal contemplation as inoperative as though it had never been passed, and hence any subsequent action of a party could not and did not give the first void order of the court appointing the receivers life and validity. *Norton v. Selby*, 6 U. S. S. Ct. 1121. The argument of the Jurisdictional Statement is not here repeated.

(2) THERE WAS NEVER ANY HEARING ON THE ORIGINAL PETITION, AND THE ONLY HEARING WAS UPON THE RECOMMENDATION OF THE RECEIVERS THAT A LIQUIDATING RECEIVER BE APPOINTED.

It is emphasized, by quoting the words of Appellees' Motion to which this Brief is opposed, and from paragraph (5) page 3 thereof that—"the Court, upon consideration of the report and inventory . . . of the temporary *co-receivers*, filed November 15, 1956, *ordered* that a hearing be held . . . on November 21, 1956 for the purpose of determining whether or not a liquidating receiver should be appointed." This was twenty-three days after the appointment of the receivers.

This statement in the words of Appellees' Motion clearly confirms as stated by Appellants on page five (5) of the "Jurisdictional Statement". "The initial proceeding on which the entire case depends was in chambers without notice" . . . It was without opportunity to be heard regarding the appointment of original receivers, and the only hearing ever held was on the recommendation of the original receivers, twenty-three days after their appointment, that a liquidating receiver be appointed for the corporation which they also reported was solvent (pp. 11a-12a).

Under the Court's original order, appointing these receivers, the next step would have been the Court's determination of a permanent receiver (p. 7a). No hearing was held under the original order of the Court.

When that hearing was held on November 21, 1956 (p. 13a), it was labeled a "Hearing on Petition for Appointment of Liquidating Receiver."

There was no petition.

The *receivers recommended* liquidating receivers and the Court held a hearing to consider that recommendation.

This was not a petition of any shareholder, creditor, or any other person for appointment of a liquidating receiver.

As stated in Appellees' Motion, which this Brief opposes, in paragraph four (4), page three (3), "On November 16, 1956, the temporary co-receivers filed . . report . . . recommended . . . that a liquidating receiver be appointed . . ."

The hearing thereon was the only hearing on appointment of any receiver.

Counsel for the petitioner Robinson was then acting for the original receivers who made the recommendation. He has continued to act as counsel for the receivers and his name is on the Appellees' Motion To Dismiss, etc., as co-counsel for Robinson, the petitioning shareholder and for the original receivers, who are the Appellees here. It ought to be noticed that counsel for the Appellees filed the report for the receivers, in which the receivers recommended that a liquidating receiver be appointed.

It is therefore an utterly misleading statement that there was any hearing except the hearings held on the original receivers' recommendation that a liquidating receiver be appointed, and this recommendation was made by these receivers twenty-three days after they were appointed.

This hearing was continued after partial hearing on November 21, 1956, to November 26, 1956, as shown by p. 35a of the Record as printed in the Supreme Court of Pennsylvania.

The only hearing therefor was on this recommendation of the original receivers that a liquidating receiver be appointed for the solvent going corporation, and not upon petition.

(3) THERE WAS NO CONSENT TO THE APPOINTMENT OF A LIQUIDATING RECEIVER.

It is believed that it is necessary only to quote the record (verbatim) as to that which the Appellees in their Motion To Dismiss, say was consent to the appointment of a liquidating receiver to show there was no such consent. It is reported p. 35a of the record as printed in the appeal in the Supreme Court of Pennsylvania, as follows:

> "THE COURT: This is a hearing, a *continued* hearing, is it not, on a petition to have a *permanent* receiver appointed?
>
> MR. MILLER: Yes, sir.
>
> MR. JONES: That is right ——"

At this point, Court and all counsel were of one mind and present for the Court's action regarding a *permanent* receiver, as ordered when receivers were first appointed (p. 7a).

It was at that point counsel for Appellants said—"Events after that (i. e. the date of the hearing of which this was the continued hearing) . . . had led me and my client to agree and say to the Court that we should do nothing further but agree to the Court appointing a *permanent* receiver *and more on from that point*" (p. 35a).

It was immediately after these words that the following transpired:

> MR. MILLER: If you please, your Honor, although the term *permanent* receiver is used, *we speak of a liquidating* receiver within the purview of the Bus-

ness Corporation Act of 1932, Sections 1107 and 1108" (p. 35a).

Appellants' counsel said nothing after this.

The Court *immediately* appointed a *liquidating* receiver, as had been recommended by the original receivers.

The Appellants moved on from this appointment of a "liquidating" receiver by filing within seven business days their petition to quash the entire proceeding as . . . "unconstitutional since the said act violates the Fourteenth Amendment of the Constitution of the United States, providing inter alia . . . 'nor shall any state deprive any person of . . . property without due process of law . . .'" (pp. 36a-37a Record Below).

The Appellants did not agree to a "liquidating receiver". They said ". . . agree to the Court appointing a *permanent* receiver and *move on from that point*". Yet this is the exact language which appellees say consented to a "liquidating receiver".

The present appellants moved to quash the proceedings as unconstitutional. When that Motion was dismissed, the present Appellants appealed to the Supreme Court of Pennsylvania, but Appellees proceeded with the sale of the corporate assets.

The Appellants thereafter bid for the assets. Counsel for Appellees will not deny that a "straw" for Appellees bid in the assets and Robinson today operates the same business in the same building and premises, under the same name.

The result accomplished by Robinson is to have ousted the Formans from their one-half ownership of the Self Drive It Corporation which *business he now operates*.

ANSWERING SPECIFICALLY THE EIGHTEENTH (18) PARAGRAPH OF THE APPELLEES' MOTION, PAGE SIX (6), WHEREIN THEY SET FORTH THEIR REASONS WHY THE APPEAL SHOULD BE DISMISSED.

Appellees say (paragraph 18a, page 6 of Appellees' Motion To Dismiss):

"Appellants having once given express consent in open court to the appointment of a liquidating receiver, at a hearing held for the express purpose, they thereby consented to the appointment of a liquidating receiver . . ."
"Appellants, by their consent and acquiescence to the appointment of the liquidating receiver induced the court to take the action of which they now complain . . ."

The Appellants reiterate, the purpose of the only hearing ever held was to consider the original receivers' recommendation for a liquidating receiver as shown above.

It was not until the Court had said "permanent receiver" and counsel for receivers and Mr. Robinson had said "Mr. Miller: Yes, sir" (p. 35a) and counsel for the Appellants, "Mr. Jones: That is right . . ." that Mr. Miller then switched to say liquidating receiver by saying (p. 35a) ". . . Although the term 'permanent' receiver is used, we speak of a 'liquidating' receiver within the purview of the Business Corporation Act . . ."

There has not been and counsel for Appellees has not and cannot point to one word of what he states was . . . "consent to the appointment of the liquidating receiver", than that which is quoted above, and that is not such consent.

It simply was not so "consented to". The allegation is a bland misstatement of fact in face of the following record facts:

On October 24, 1956, the Court, upon an ex parte, unsupported petition, in chambers, appointed receivers to operate the affairs of the solvent going business for sixty days when it would make its determination upon the appointment of a permanent receiver (pp. 6a and 7a of record below).

These temporary receivers took over before the corporation or the Appellants who owned fifty percent of the stock had notice or opportunity to be heard.

Thereafter, these receivers filed a report on November 15, 1956, in which these *receivers recommended* that the corporation be liquidated (Appellees' Motion To Dismiss, paragraphs 4 and 5, page 3).

Counsel for the petitioning stockholder Robinson had been appointed counsel for the receivers and the report and recommendation for liquidation was filed by him on behalf of the receivers.

There was never any *petition* for appointment of a liquidating receiver filed. The receivers' recommendation in this respect was acted upon, and this is stated, verbatim, in Appellees' Motion To Dismiss, etc. paragraph five (5), page three (3) ". . . *the court upon consideration of the report . . . ordered* that a hearing be held . . . November 21, 1956, for the purpose of determining whether or not a liquidating receiver should be appointed."

It is this mislabeled hearing which the Appellees in that part of their Motion To Dismiss (quoted above) say was ". . . a hearing *held for the* express *purpose of affording due process* (paragraph 18(a), pp. 6 and 7 of Motion To Dismiss to which this brief is a reply).

Such averment in the Motion To Dismiss is certainly indicative there had not been any prior hearing which had afforded due process.

It is the assertion that a hearing held on the recommendation for the appointment of a liquidating receiver, was to afford and did afford the due process necessary to the constitutional appointment of the original receivers, who had

acted as receivers for twenty-three days and had then recommended a liquidating receiver.

The Appellees state in paragraph 18(d), page 8 of their Motion "This is distinguished from *Nottebaum vs. Leckie et al*, 31 F. 2d 556, for . . . court . . . appointed permanent receivers and granted an absolute injunction in ex parte proceedings, without opportunity to the defending parties to be heard or without provision for a hearing to be held." "In the instant case the Lower Court *ex parte* appointed Temporary Receivers until a hearing be held. This was not a final decree. That on a date fixed by the Lower Court hearings were held (Same are fully referred to in this brief)" (verbatim from Appellees' Motion To Dismiss).

But the only hearing was on the original receivers' recommendation, as shown, supra.

It will not escape the Court that Appellees say "(Same are fully referred to in this brief)" but that they do not cite the page of the record or refer to it so the alleged hearing can be identified, and that is because the only hearing ever held was November 15, 1956 . . . "the court upon consideration of the report (of the already functioning receivers) . . . ordered that a hearing be held on . . . November 21, 1956 for the purpose of determining whether or not a liquidating receiver should be appointed." (Verbatim from paragraph five (5), page three (3) of Appellees' present Motion To Dismiss, etc.).

STATEMENTS FROM APPELLEES' MOTION TO DISMISS, ETC. ARE LAID SIDE BY SIDE TO SHOW THE DUPLICITY OF THE AVERMENTS.

In paragraph four (4), page three (3) of "Appellees' Alternative Motion Under Rule 16 To Dismiss or Affirm" to which this brief is opposed the Appellees say to this Court:

> "4. On November 15, 1956 the temporary co-receivers filed a full and complete report . . . in which they recom-

mended . . . that a *liquidating* receiver be appointed with full powers . . . to liquidate the assets of the subject corporation.

5. That on the *same date* November 15, 1956, the court upon consideration of this report . . . ordered a hearing to be held . . . November 21, 1956, for the purpose of determining whether or not a *liquidating* receiver should be appointed."

But Appellees also state:

Page six (6), Appellees' Motion To Dismiss, etc. "18(a) Appellants having once given express consent in open court to the appointment of a liquidating receiver *at a hearing held for the express purpose of affording due process*, etc. etc."

Page seven (7), "18(c) The record discloses that on November 15, 1956, the Common Pleas Court fixed a hearing on the *merits* of the *stockholders' petition* to be held on November 21, 1956, etc. etc."

There was no stockholders' petition, upon which any hearing was held, supra.

There was a receivers' recommendation that a liquidating receiver be appointed upon which the hearing was held.

The Appellees' Motion To Dismiss, etc. in paragraph 18(d), page seven (7), says:

"The order of the Court of Common Pleas No. 1 . . . appointing the temporary receivers provides . . . that the court shall pursuant to order fix a date for hearing upon this petition . . ." but the Appellees with utter disregard for the exact and full order fail to quote it in full (from page 7a of the record below) as follows:

"That the court shall, pursuant to order, fix a date for a hearing upon this Petition, and, at such time upon the petition and facts and full hearing held thereon, make its determination upon the appointment of a *permanent*

receiver for such purpose as the court may thereupon determine."

The Court never fixed a date "for a hearing upon this petition". It held a hearing as has been pointed out several places and times above in this brief and in the words of appellees' Motion To Dismiss, etc. paragraphs 4 and 5, page 3: "On November 15, 1956, the temporary co-receivers filed a . . . report . . . in which they recommended . . . that a liquidating receiver be appointed . . . * * * That on the *same date* November 15, 1956, the court, upon consideration of the report . . . of this temporary co-receivers, ordered that a hearing be held . . . on November 21, 1956, for the purpose of determining whether or not a liquidating receiver should be appointed."

After failing to quote the full order in paragraph 18(d) the Appellees continue with this assertion at top of page seven (7) of their Motion to Dismiss, etc.:

"This is distinguished from the case of *Nottebaum vs. Leckie et al*, 31 F. 2d 556 . . . etc. etc."

It is unquestioned that case will be read by those reviewing this brief. It required seven pages to report it in the Federal Reports. It obviously need not be copied here in full.

It is not "distinguished" from this case.

It is on all fours with this case. There was petition in a United States District Court under the New Jersey General Corporation Act with almost identical proviso as the Pennsylvania Business Corporation Act, here attacked. The petition asked for receiver for an alleged *insolvent* corporation. It was allowed on petition in chambers without notice and opportunity to be heard. The receivers were appointed "until further order of the court", 31 F. 2d 558. The same injunction and orders to restrain and compel delivery of assets were there decreed, as here.

"The receivers were further authorized to take complete control and possession . . . and to operate and manage the business . . ." just as here. 31 F. 2d 558.

"The defendant had no notice or knowledge of these proceedings until the receivers arrived with the court's decree appeared and . . . ousted defendant . . . took full possession of its property, assets and business" as here.

"What, then, is the legal situation. On presentation of the bill and affidavit the court passed summarily on the case so presented, and finding the facts there asserted to be true, appointed receivers, which immediately and of itself divested the defendant of all its property. This was a final decree." 31 F. 2d 559. As here it, also, was and is.

"Nottebaum's affidavit was filed in his own behalf" 31 F. 2d 561, just as is the Forman action here.

"He had no authority or legal right to act for the company and did not undertake to do so. *His individual action, can in no sense be construed as a corporate action. What he did, or neglected to do, cannot bind the corporation.* In passing on the affidavits and entering the order August 6, 1923, continuing the receivers, the rights of the corporation in its property, its business and its franchises, were in no way altered . . . No act had been done (i. e. by Nottebaum and others in contesting the taking of the corporate assets, comment in this parenthesis supplied) which could give it life, or estop the defendant from asserting its invalidity" 31 F. 2d 561.

Foremans, the Appellants, here, are stockholders, they cannot bind the corporation. Nothing they can do in contesting this unconstitutional taking of the corporate assets, by agreeing to a permanent receiver or any other act, can estop the assertion of the invalidity and make it constitutional.

Enough has been quoted to show the court the case of *Nottebaum v. Leckie* and this case involved almost identical factual situations and certainly the same legal question of constitutionality is raised.

The decision in *Leckie v. Nottebaum* and in this case are conflicting decisions of the Third Circuit Court and the Supreme Court of Pennsylvania in the same judicial district, on substantial questions.

A SHAREHOLDER CANNOT BIND THE CORPORATION.

Appellees' paragraph 18(e), page eight (8) of their Motion To Dismiss, etc. again says that there was consent to appointment of a liquidating receiver and implies that a shareholder can consent to such appointment on behalf of the corporation, and that by so doing, the shareholder can give validity to the unconstitutional appointment of receivers.

The shareholder cannot bind the corporation. 31 F. 2d 556, 561, as quoted above from *Leckie v. Nottebaum.*

The shareholder cannot give validity to a null and void unconstitutional act of any state. That is the ultimate holding of *Leckie v. Nottebaum*, 31 F. 2d 556.

REPLY TO THE APPELLEES' RECAPITULATION OF ITS REASONS TO DISMISS; IS AS FOLLOWS AND TO EACH REASON AS NUMBER AT THE BOTTOM OF PAGE TEN AND TOP OF PAGE ELEVEN OF THE APPELLEES' MOTION TO DISMISS.

Reply to 1: The original appointment of temporary receivers was *not* with notice and opportunity to be heard. It was ex parte, in chambers, without notice. The order itself took the corporate assets and property, vested it immediately in the receivers, who took charge of the property and business forthwith and no opportunity to be heard was allowed. Supra.

Reply to 2: The order of October 24. 1956, appointing the temporary receivers until further order of the court was as said in *Nottebaum v. Leckie, et al*, 31 F. 2d 556. page 559: "On the presentation of the bill . . . the court passed summarily on the case so presented . . . appointed receivers; which immediately *and of itself*, divested defendant of all its property. *This was a final decree.*"

Reply to 3: The Appellants are shareholders. They did not consent to a liquidating receiver or to liquidation as shown hereinabove. Had they done so, such consent could not bind the corporation, nor validate a null and void unconstitutional act and order of the court predicated on and under such act or law. 31 F. 2d 556, as quoted supra.

Reply to 4: The record does not disclose that Appellants gave their express consent in open court to the appointment of the liquidating receiver at the hearing held for the express purpose of affording due process. It shows the contrary and moreover even if given by a stockholder, it cannot bind the corporation.

There was never any notice or hearing on the original petition appointing receivers. The only hearing ever held was on the recommendation of the receivers appointed without notice at hearing, some twenty-three days after their appointment, and such a hearing could not and did not supply the due process of notice and opportunity to be heard as to their appointment. Supra.

Reply to 5: The constitutionality of the Business Corporation Law of Pennsylvania, specifically Sections 1107, 1108. Act of May 5, 1933, 364, 15 P. S. 2852, is in issue, placed in issue by the petition to quash (pp. 36a-37a of the record below). It was passed upon by the Supreme Court of Pennsylvania, which held the alleged consent of a stockholder made valid the unconstitutional act and action of the court in appointing receivers for a solvent going corporation. It is the question here presented on the appeal filed from the Supreme Court of Pennsylvania. Supra.

The Appellants therefore urge the Court to refuse the "Appellees' Alternative Motion Under Rule 16, To Dismiss or Affirm" and to hear the constitutional question raised by the appeal and stated in the Jurisdictional Statement heretofore filed.

Respectfully submitted,

THOMSON F. EDWARDS,
J. WEBSTER JONES,
Attorneys for Appellants.

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IN THE

Supreme Court of the United States

October Term, 1957.
No. 726.

M. ALEXANDER FORMAN and BETTY FORMAN, his wife, *Appellants*

v.

Irwin Apfel, Liquidating Receiver of Self Drive It Corporation and Richard S. Robinson, Petitioning Shareholder

APPELLEES ALTERNATIVE MOTION UNDER RULE 16 TO DISMISS OR AFFIRM.

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---

APPELLEES ALTERNATIVE MOTION UNDER RULE 16 TO DISMISS OR AFFIRM.

AND NOW, on this 7 day of ~~January~~ February, 1958, by their attorneys, A. D. Caesar, Esquire, and Nathan I. Miller, Esq., comes appellee, Irwin Apfel, duly appointed and qualified Liquidating Receiver of Self Drive It Corp., and appellees Richard S. Robinson and Florence H. Robinson, who moves the court to dismiss or affirm the appeal in the above entitled case.

1. Self Drive It Corp. is a Pennsylvania corporation, with officers, directors and shareholders as follows:

a) Officers: President—Richard S. Robinson
Secretary-Treasurer—M. Alexander Forman

b) Directors: Richard S. Robinson (appellee)
Florence H. Robinson (his wife) (appellee)
M. Alexander Forman (appellant)

c) Shareholders and Percentage of Ownership:

Richard S. Robinson	49 percent
Florence H. Robinson	1 percent
Total	50 percent
M. Alexander Forman	49 percent
Betty Forman	1 percent
Total	50 percent

2. On October 24, 1956, Richard S. Robinson, appellee, petitioned the Common Pleas Court of Philadelphia County under Section 1107(A)(4) of the Pennsylvania Business Corporation Law of 1933 as amended for the appointment of a liquidating receiver to liquidate the assets and wind up the business of Self Drive It Corp. because its directors were deadlocked in the management of the corporate affairs, the shareholders were unable to break the deadlock, irreparable damage and injury was being suffered by the said corporation, and such damage and injury would continue and be of such character and nature as to destroy the equity of the shareholders and be injurious to the creditors.

3. Thereafter, on the same day and pursuant to Section 1108(A) of said Law, and upon consideration of the said petition, Irwin Apfel, Esquire and David Cohen, Esquire were duly appointed (and thereafter duly qualified by filing of bond) as temporary (pendente lite) co-receivers of Self Drive It Corp. until a hearing be held for the purpose of determining whether a permanent receiver to liquidate

the assets should be appointed. The temporary co-receivers were further ordered to file an inventory and appraisement of the assets and property and within thirty days to make a full report to the Court.

4. On November 15, 1956, the temporary co-receivers filed a full and complete Report and Inventory and Appraisement (with copious Exhibits attached) in which they recommended and gave their detailed reasons therefor that a liquidating receiver be appointed with full powers and authority, and that he be authorized to liquidate the assets of the subject corporation.

5. That on the same date November 15, 1956 the court, upon consideration of the report and inventory and appraisement of the temporary co-receivers, ordered that a hearing be held at 3:00 o'clock, P.M. on November 21, 1956 for the purpose of determining whether or not a liquidating receiver should be appointed.

6. At the time and place so scheduled, David N. Bressler, Esquire and Phillip B. Robinson, Esquire duly entered their appearances on behalf of Richard S. Robinson and Florence H. Robinson, appellees, and J. Webster Jones, Esquire entered his appearance of record on behalf of M. Alexander Forman and Betty Forman, appellants. Appellants' counsel on appellants' behalf thereupon cross-examined the witnesses who testified for petitioner, and, finally, appellants' counsel requested on appellants' behalf that the hearing be continued for one week in order to prepare and review appellants' case. The court, over objection, granted the request, and the hearing was accordingly continued to November 28, 1956.

7. On November 28, 1956, when the continued hearing was resumed, appellants' counsel announced in open court and in the presence of M. Alexander Forman, appellant,

that he agreed and stipulated to the appointment of a liquidating receiver (35a), and, pursuant to and in reliance upon such agreement and stipulation, Irwin Apfel, Esquire was then and there appointed by the Court under Section 1108(B) of said Law as liquidating receiver to liquidate all of the assets and affairs of Self Drive It Corp. Said liquidating receiver has duly qualified by the filing of bond.

The record before the lower court states precisely the use of the correct term as used in the act herein referred to as "Liquidating Receiver". That appellants did not object to and in fact said nothing at all which would have the effect of qualifying the consent to the appointment of the liquidating receiver. The record further disclosed that the court makes reference to the services and the acts to be performed by the liquidating receiver that the court appointed and throughout said discourse by the court appellants neither objected nor gave any objection whatsoever that they intended to qualify their consent to the appointment of a receiver.

8. On December 4, 1956, the liquidating receiver filed a petition for leave to sell in bulk the assets of Self Drive It Corp., and upon consideration of such petition, the court ordered and decreed on December 5, 1956, that the liquidating receiver sell all of the assets in bulk of Self Drive It Corp. in open court and to the highest bidder, the sale to be held at 3:00 o'clock p.m. on December 19, 1956. The order and decree also contained full, complete and detailed terms and conditions under which the sale was to be conducted.

9. At approximately 2:35 o'clock p.m. on December 19, 1956, J. Webster Jones, Esquire, on behalf of M. Alexander Forman and Betty Forman, his wife, lodged a notice of appeal with the Prothonotary of the Supreme Court of Pennsylvania (54a). Said notice of appeal merely stated that an appeal was to be entered from "The Order and Judgment of Common Pleas Court No. 1 of the County of

Philadelphia," and was made returnable the third Monday in April, 1957, to wit, April 15, 1957. Said notice of appeal improperly and erroneously described the proceedings as being a "Receivership in Equity."

10. Thereafter, on the same day, to wit, December 19, 1956, at 3:00 o'clock p. m. at the scheduled time and place for the scheduled sale, appellants' counsel requested the court to continue the sale for nine days so that he could "submit other bids that are in the offing but which I am not in a position to submit today" (54a). The Court, over objection, granted the request, and continued the sale until 12:00 noon on December 28, 1956.

11. At 12:00 noon on December 28, 1956, when the continued sale was resumed, appellants' counsel once again requested the Court to continue the sale, this time until January 8, 1957, so that he could have additional time in which to discuss with the "gentleman who would have the final say" and "who, as we represented to the Court is interest in making a bid" and, further stated appellants' counsel, "I expect to obtain what I believe should be a substantial offer from that particular source." (N.T.—12/28/56 —p. 37.) The Court again over objection granted this, appellants' fourth, continuance.

12. On January 8, 1957, at 10:00 o'clock a.m., when the sale (twice continued at the request of appellants' counsel) was resumed, the liquidating receiver sold all of the assets of Self Drive It Corp. in open court and under judicial supervision to one Allen Weinberg, the highest bidder thereat, who bid $673,000 (subject to adjustments at the closing date). Appellants' counsel, on behalf of appellants, M. Alexander Forman (who was present) and Betty Forman, there and then participated in the bidding, and bidded on behalf of appellants the next to the highest bid, to wit, $672,000. Said bidding was progressive from an opening bid of $585,000.

13. Under the terms and conditions of the sale, the amount of the final successful bid was subject to certain adjustments, which amounted to an additional sum of $123,580.56. Thus, the assets were sold for a total price of $796,580.56, which is an amount sufficiently large so that after all creditors and administration expenses of corporation are satisfied in full, a substantial equity will remain for division among the shareholders.

14. Said sale of the assets to Allen Weinberg was confirmed by orders of the Court dated January 8, 1957 and January 11, 1957.

15. All of the assets (including realty) of said corporation have been liquidated, and title to all assets has been duly conveyed, transferred and assigned by the liquidating receiver.

16. The total purchase price of $796,580.56 has been paid in full to the liquidating receiver, from which fund the liquidating receiver has discharged by payments with Court approval first obtained by petitions and orders and under Court supervision all obligations incurred by the temporary co-receivers and the liquidating receiver (amounting to approximately $104,623.26), and the claims of all secured creditors (amounting to approximately $429,239.71), and taxes (amounting to approximately $11,198.25).

17. The first and final account of the temporary co-receivers, and the first account, operating and liquidating, of the liquidating receiver, has been filed and said accounts have been audited and confirmed on December 16, 1957.

18. The appeal of M. Alexander Forman and Betty Forman his wife should be dismissed for the following reasons:

(a) Appellants having once given express consent in open court to the appointment of the liquidating receiver

at a hearing held for the express purpose of affording due process, they thereby consented to the appointment of the liquidating receiver and thus impliedly, if not expressly, admitted the necessity for such an appointment. Appellants, by their consent and acquiescence to the appointment of the liquidating receiver, induced the court below to take the action of which they now complain and appellants should, therefore, be foreclosed from complaining about the order of the court.

(b) The Court of Common Pleas did on December 5, 1956, order the sale of the assets of Self Drive It Corp. That thereafter on December 19, 1956, after appellants had consented to the court's action in ordering the sale, did lodge a notice of appeal with the Prothonotary of Supreme Court of Pennsylvania and consequently had no basis for appeal.

(c) The record discloses that on November 15, 1956 the Common Pleas Court fixed a hearing on the merits of the stockholders petition to be held on November 21, 1956 at a fixed time and place and requiring notice of said hearing to be served upon all parties in interest. Affidavit of service of notice was filed. At the time and place so scheduled appellants appeared with counsel and participated in the proceedings. They obtained a continuance in order to present their testimony, said hearing was therefor continued until November 28, 1956. At the continued hearing appellants attended with their counsel and expressly agreed to the appointment of the Liquidating Receiver. Appellants participated actively in all proceedings had thereafter including their active participation in the bidding at the sale held pursuant to Petition and Order of the Common Pleas Court.

(d) The order of the Court of Common Pleas No. 1 of October 24, 1956, appointing the temporary receivers provides in Paragraph 1 Sub Section 7 thereof *"that the court shall pursuant to order, fix a date for hearing upon this petition, * * *"*.

This is distinguished from the case of *Nottebaum et al v. Leckie et al* (Noxom Chemical Products Co. Inc.), 31 F. 2nd 556, for in said cited case the Lower Court appointed permanent receivers and granted an absolute injunction in ex parte proceedings, without opportunity to the defending parties to be heard or without provision for a hearing to be held.

The Court of Appeals held that this was a final decree in which the suit between the parties was at an end. That the Lower Court so acting without affording the defendants an opportunity to be heard was a taking of its property without due process of law.

In the instant case the Lower Court ex parte appointed Temporary Receivers until a hearing be held. This was not a final decree. That on a date fixed by the Lower Court hearings were held. (Same are fully referred to in this brief.)

(e) Appellants in their jurisdictional statement pages 6, 8, 9, 14, rest their argument for certiorari primarily on the words "and move on from that point," stated by co unsel for appellants at the hearing of November 28, 1956 (the second hearing held on the merits of the stockholders petition). These words convey most particularly a colloquial expression, meaning let us take up the next matter, and the record reflects that the next matters were the appointment of the Liquidating Receiver, the submission of the order of appointment of said Liquidating Receiver, the examination of same by the Court and all counsel and the signing of said order by the Court. These words mean exactly what they state "move on from that point" and do not in any aspect reflect a reservation or waiver.

They are clear and unambiguous words and cannot be interpreted to record a reservation or waiver. The record is clear and concise and nowhere therein did the appellants object, or reserve the right to object to the appointment of the Liquidating Receiver, on the contrary the record discloses an expressed consent to such appointment.

(f) Appellants in question presented (Jurisdictional statement page 3-14), assumes that the action of the Court of Common Pleas in appo nting the Temporary Receivers was void. The record discloses that the appointment of Temporary Receivers was made pursuant to the provisions of the Business Corporation Law of Pennsylvania. (Act of May 5, 1933 P. S. 364 15 P. S. 2852 Sections 1107-1108.) Appellants by motion to quash, set aside and dismiss urged the Court of Common Pleas to dismiss the proceedings as being unconstitutional. Said motion was filed on December 7, 1956, same was dismissed by the Common Pleas Court after hearing thereon. The appeal filed by Appellants on December 9, 1956, to the Supreme Court of Pennsylvania did not raise the question of constitutionality of the Business Corp. Law of Pennsylvania, or particularly Sections 1107-1108 thereof (see statement of questions involved—Brief of Appellants—Appeal to Supreme Court of Pa.).

Appellants contend that their petition to quash, set aside and dismiss was made "at the earliest possible moment" (page 9 paragraph 4 of appellants' Brief). *This is not so.* Appellants allege the unconstitutional act to be the appointment of the temporary receivers on October 24th, 1956. Notice of this appointment was immediately sent to appellant. A hearing on the original petition of October 24th, 1956 was held on November 21st, 1956 where appellant appeared and cross examined appellees and appellees' witnesses. At the close of the hearing of November 21st, 1956, appellant asked for and was granted a continuance in order to prepare his case concerning whether or not a deadlock in management of the corporation, etc. occurred. There was no motion to quash, set aside or dismiss or any other form of objection to the proceedings filed or made by appellant. Nor did appellant file or make any objection whatsoever at the continued hearing held on November 29th, 1956 where, to the contrary, appellant agreed to the appointment of a liquidating receiver. The first act appellant took objecting to the proceedings was on December 7, 1956.

That a Temporary Receiver may be appointed in advance of a hearing where irreparable injury would be sustained has been upheld in the Courts of the Commonwealth of Pennsylvania and in the Federal jurisdiction, both at common law and by case law. *Gowan, et al. vs. Jeffries*, 2 Ash. 296 (1840); *Kolb Coal Co. vs, Sauter*, 295 F. 690 (1924); *Shoemaker, et al. vs. Menell Mortuaries, Inc., et al.*, 2 Fed. Sup. 672 (1933); *Tennessee Pub. Co. vs. Carpenter*, 100 Fed. 2nd 728 (1938).

In the instant case, the appellees are proceeding under a statute wherein the legislature has propounded and enumerated the specified instances in which "actual emergency and irreparable harm and damage exist." In so doing they are merely crystallizing the common law doctrine pertaining to the appointment of temporary receivers.

It is well settled that ex parte appointments of temporary receivers is a constitutional fact. Rule 1533 of the Pennsylvania Rules of Civil Procedure recognizes this and states (inter alia) "(a) a temporary receiver may be appointed without notice if required by the exigencies of the case * * *."

To recapitulate.

1. The original appointment was of temporary receivers with notice of an opportunity to be heard.

2. The order of October 24, 1956 appointing the temporary receivers until hearing held, was not a final decree, but an interlocutory decree.

3. The record discloses that at the hearing held on November 21, 1956, appellants actively participated and that at the hearing of November 28, 1956, appellants participated and specifically consented. Appellants can not now say that they had no opportunity to be heard or present their claims or defense.

4. The record discloses that appellants gave their express consent in open court to the appointment of the liquidating receiver at the hearing held for the express purpose of affording due process.

5. That the constitutionality of the Business Corp. Law of Pennsylvania particularly Sections 1107-1108, Act of May 5, 1933 P. S. 364 15 P. S. 2852 is not in issue.

WHEREFORE, IRWIN APFEL, Liquidating Receiver of Self Drive It Corp., and Richard S. Robinson and Florence H. Robinson, move the court by their counsel, to dismiss or affirm the appeal of M. Alexander Forman and Betty Forman, his wife, for any and all of the foregoing reasons.

A. D. CAESAR,

A. D. Caesar

Nathan I. Miller

NATHAN I. MILLER,

Attorneys for Appellees.